***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S APPENDIX

76-1470

# UNITED STATES COURT OF APPEALS

*for the*

# SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

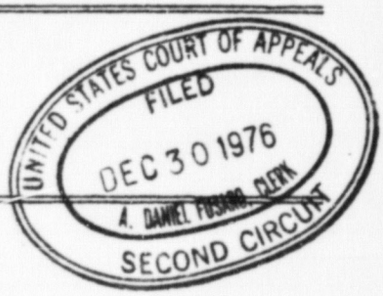
v.

JOSEPH SETTER

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

## APPELLANT'S APPENDIX




IRWIN KLEIN
Attorney for Defendant-Appellant
400 Madison Avenue
New York, N. Y. 10017

DAVID G. TRAGER
United States Attorney, Eastern District of New York
Attorney for Plaintiff-Appellee
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York

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DOCKET / MAGISTRATE | Assigned Trial | Disp./Sentence

207 District | 01 Office

U.S. vs. JOSEPH JAMES-SETTER (Amended Oct. 30, 1975) Defendant

75 CR 767-1

Day 17 | Mo. 10 | 75 | 767 | 1

No. of 1 Defts

BRAMWELL

MAGR. CASE NO. 75 M 1165

CHARGES

U.S. CODE SECTION: 21-841(a)(1)

COUNTS: 4

Did possess with intent to distribute and did distribute cocaine

ATTORNEYS

U.S. Attorney or Asst: Richard Appleby

For Defendant: Jacob Irwin Klein, 2 Park Ave., NYC. MU3-0054 869 8338

BAIL / RELEASE

☐ Denied ☒ Personal Recog. ☐ Unsecured Bond ☐ Condition Release

AMT Set (000): $ 10

date

☐ Bail Not Made ☐ Bail Status Changed (See Docket)

☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Party Custody ☐ PSA

PROCEEDINGS

ARREST: 7/3/75 or U.S. Custody Began on Above Charges ☐ Prosecution Deferred

☐ High Risk Defn. & Date Design'd

INDICTMENT / Information: 10/17/75 ☐ Waived ☐ Superseding Indict/Info

ARRAIGNMENT: 1st Plea 10/30/75 Final Plea

TRIAL: 5/24/76 3/22/76 ☒ Not Guilty ☐ Nolo ☐ Guilty ☐ Not Guilty ☐ Nolo ☐ Guilty; Trial Begun ☐; Trial Ended

Disposition: ☐ Convicted ☐ Acquitted ☐ Dismissed ☐ Nolled/Discontinued*; SENTENCE 9/24/76; ☐ On All Charges ☐ On Lesser Offense(s); ☐ WOP; ☐

| | | DATE | INITIAL/No. |
|---|---|---|---|
| Search Warrant | Issued | | |
| | Return | | |
| Summons | Issued | | |
| | Served | | |
| Arrest Warrant | | 7-3-75 | VAC 070A |
| COMPLAINT | | 7-3-75 | " |

INITIAL APPEARANCE — INITIAL/No

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled ____ Date Held ____ ☐ Waived ☐ Not Waived ☐ Intervening Indictment

Tape No. — INITIAL/No

OUTCOME

☐ Dismissed ☐ Held for District GJ

BOND: ☐ Exonerated ☐ To Transferee District

☒ Held to Answer to U.S. District Court

AT EN NY

Magistrate's Initials ▶

OFFENSE (In Complaint): Possession with intent to distribute cocaine

* Show last names and suffix numbers of other defendants on same indictment/information

V. Excludable Delay (a) (b)

| DATE | PROCEEDINGS |
|---|---|
| 10-17-75 | Before NEAHER, J - Indictment filed. |
| 10/20/75 | Notice of readiness for trial filed |
| 10-30-75 | Notice of Appearance filed. |
| 10-30-75 | Before BRAMWELL, J - case called - deft Joseph Setter & atty Irwin Klein present - Motion by AUSA Appleby to amend indictment to read Joseph Setter is granted. Deft arraigned and waives reading of the indictment and enters a plea of not guilty - 30 days for motions is granted - bail contd - case adjd to Dec. 1, 1975 to set a trial date. |
| 12/1/75 | Before BRAMWELL,J.- Case called- deft and counsel present case adjd to 12/16/75 at 10:00 A.M. |
| 12/5/75 | Stenographers Transcript dated 12/1/75 filed |
| 12-15-75 | Before JUDD, J - Superseding Indictment filed. |
| 12-16-75 | Before BRAMWELL, J - case called - deft & counsel Irwin Klein ~~xxxxxx~~ by Harry Burstein present - deft waives reading of the indictment and enters a plea of not guilty - bail contd - 30 days for motions - case adjd to Jan.26,1976 for trial at 10:00 am. |
| 12/22/75 | Notice of Readiness for Trial filed. |
| 1-22-76 | Notice of motion for a suppression hearing, ret 1-26-76 at 10 A.M. filed. |

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE

A-1

A-2

| DATE | IV. PROCEEDINGS (continued) | V. EXCLUDABLE D... (a) | (b) | (c) | (d) |
|---|---|---|---|---|---|
| 1-27-76 | Before BRAMWELL, J - case called - deft & atty I.Klein by Stanley Fischer present - motion to suppress argued - decision reserved - defts brief by 2-3-76. | | | | |
| 1-27-76 | Before BRAMWELL, J - case called - deft & atty Stanley Fischer present - adjd to 2-23-76 for trial. | | | | |
| 2/23/76 | By BRAMWELL,J.- Order filed permitting examination of original tape recordings by deft's expert, etc. | | | | |
| 2/23/76 | Before BRAMWELL,J.- Case called- deft and counsel present- case adjd to 3/22/76 at 10:00 A.M. for trial | | | | |
| 3-22-76 | Before BRAMWELL, J. - Case called. Deft & counsel present. Case adj'd to 5-3-76 for trial at 10 A.M. on consent. | | | | |
| 5/3/76 | Before BRAMWELL,J.- case called- case adjd to 5/5/76 at 10:00 A.M. for trial | | | | |
| 5-5-76 | Before BRAMWELL, J - case called & adjd to May 10,1976 | | | | |
| 5-5-76 | Affidavit of Harry H. Burstein filed. | | | | |
| 5/10/76 | Before BRAMWELL,J.- Case called- deft and counsel present-case adjd to 5/100/76 at 10:00 A.M. for trial | | | | |
| 5/17/76 | Before BRAMWELL,J.- Case called- adjd to 5/24/76 for trial | | | | |
| 5-24-76 | Before BRAMWELL, J - case called - deft & counsel present - Evidentiary Hearing begun - decision reserved - deft renews motion to suppress, etc. Motion denied - Trial contd to May 25, 1976 at 11:00 am. | | | | |
| 5-25-76 | Before BRAMWELL, J - case called - deft & counsel present - trial resumed - trial contd to May 26, 1976 | | | | |
| 5-26-76 | Before BRAMWELL, J - case called - deft & counsel Irwin Klein present - trial resumed -Harvey Rosenberg sworn as witness on his own behalf - witness refuses to answer any questions due to self incrimination. Court finds the witness be held in civil contempt for the duration of this trial. Witness taken into custody by U.S.Marshals. Trial contd to May 27, 1976 at 11:00 am. | | | | |
| 5/27/76 | Before BRAMWELL,J.- Case called- deft and counsel present-trial resumed- deft's motion for withdrawal pf juror and for misttial - motion denied-govt rests deft's motion to dismiss motion denied-trial contd to 5/28/76 at 1:30 P.M. | | | | |
| 5/28/76 | By BRAMWELL,J.- Order of ~~xiix~~ commitment of civil contempt of witness Harvey Rosenberg filed for | | | | |
| 5-28-76 | Certified copy of order of commitment returned and filed/subject remanded to Warden MCC, N.Y. | | | | |
| 5-28-76 | Before BRAMWELL, J. - Case called. Deft & counsel present. Trial resumed. Mr. Klien moves for a withdrawl of juror. Motion denied. Trial continued to 6-1-76 at 11 A.M. | | | | |
| 6-1-76 | Before BRAMWELL, J - case called - deft & counsel present - trial resumed - Defts motion to suppress evidence etc. Motion denied - deft rests - deft moves to dismiss counts 1 to 4 motion denied ; defts moves to dismiss count 5 - denied - defts | | | | |

(a) Interval (per Section II) | Start Date / End Date | (c) Ctr Code | (d) Tot. Days

A-3

75 CR 767
CRIMINAL DOCKET

# 75CR 767

| DATE | PROCEEDINGS |
|---|---|
| | motion for withdrawal o a Juror and for Mistrial - motions denied - Trial contd to June 2, 1976 |
| 6-2-76 | By BRAMWELL, J - Order filed that Harvey Rosenberg be released forthwith from the custody of the U.S.Marshal for the Eastern Districtof NY. |
| 6-2-76 | Before BRAMWELL, J - case called - deft & counsel present - trial resumed - court charges Jury at 10:10 am to 11:15 am. Jury resumes deliberations at 12:30 PM. Jury came into court at 2:30 PM and rendered a verdict of guilty to counts 1 to 5- Court dismisses count 5 from Bench - Jury polled & discharged - Bail contd - trial concluded - sentence adjd without date. |
| 6-2-76 | By BRAMWELL, J - Order of sustenance filed. |
| 6/7/76 | Certified copy of order of 6/2/76 retd and filed-executed |
| 9/17/76 | Before BRAMWELL, J. - Case called. Deft & Counsel Irwin Klein present. Sentence adjd to 9/24/76 at 10:00 a.m. (JOSEPH L. SETTER). |
| 9/24/76 | Before BRAMWELL, J.- Case called. Deft & Counsel present. Deft sentenced to imprisonment for a period of 7 (seven) years on count 1 plus a Special Parole term of 5 years. On counts 2, 3, & 4 deft sentenced for a term of 7 years plus a Special Parole term of 5 years. Sentences on count 2,3, & 4 to run concurrent with sentence on count (1). Deft advised of his right to appeal. Court assigns Irwin Klein as counsel for appeal. Deft granted permission to procedd in forma pauperis. Deft to post surety bond of $5,000.00 by 10/7/76. |
| 9/24/76 | Judgment & Commitment filed. Certified copies to Marshals & Probation. |
| 9/27/76 | Notice of Appeal filed. |
| 9/27/76 | Duplicate copy of Notice of Appeal and docket sheets mailed to the Court of Appeals.(JOSEPH SETTER). |
| 10/7/76 | By CATOGGIO, J.- Order for acceptance of cash bail filed.(SETTER) |
| 10-22-76 | Notice of motion and affidavit filed for Discovery, Bill of Particulars, etc. |
| 10-22-76 | Memorandum of Law filed by deft. |
| 10-26-76 | Order received from the court of appals filed that the record onappeal be docketed on or before Nov. 8, 1976(SETTER) |
| 11-5-76 | Record on appeal certified and handed to Carol Luckese,office of Irwin Klein,Esq. for delivery to the Court of appeals. |
| 11-8-76 | Acknowledgment received from Court of Appeals for receipt of the Record on Appeal. - filed. |

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# 75CR 767

| DATE | PROCEEDINGS |
|---|---|
| 11-12-76 | Stenographer's Transcripts dated May 25, 1976; May 26, 1976; May 27, 1976 (A.M.); May 27, 1976 (P.M.); May 28, 1976 (P.M.) June 1, 1976; June 2, 1976 September 24, 1976 - filed. |
| 11/16/76 | Voucher for compensation for expert services filed. |
| 11/19/76 | Record on appeal certified and deliverd to theC of A by Carol Luckise. |
| 12-1-76 | Acknowledgment received from the court of appeals for receipt of Index to Record and filed/ |
| 12-6-76 | Scheduling order filed received from the court of appeals that the argument k of the appeal be heard during the week of 2-14-77 |
| 2-15-76 | Stenographer's Transcript dated May 24, 1976 filed. |

753076

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A-5

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INDICTMENT

- - - -

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COUNT FOUR

On or about the 25th day of April 1978, within the Eastern District of New York, the defendant JOSEPH BUTLER did knowingly and intentionally distribute approximately 125.85 grams of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

COUNT FIVE

On or about the 3rd day of July 1978, within the Eastern District of New York, the defendant JOSEPH BUTLER did knowingly and intentionally possess with intent to distribute approximately 331.35 grams of cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

A TRUE BILL

FOREMAN

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

A-7



THE CLERK: For trial U.S.A. versus Joseph Getter.

MR. APPLEBY: The Government is ready for trial and for the hearing.

THE COURT: We'll have the hearing first.

What is the nature of the hearing?

MR. APPLEBY: Perhaps Mr. Klein can enlighten us of the contention of defendant.

MR. KLEIN: The nature of the hearing is evidentary hearing on the question of whether or not there was a lawful search and seizure here. The facts, as I understand it, defendant came out of his house and he was outside in the street, in the driveway, and he was surrounded by a number of agents at gun point who put him under arrest, then they took him back into the house, and then they began searching the house and they found a quantity of cocaine in the house.

THE COURT: Now, do you have any memorandum of law as to this issue?

MR. APPLEBY: There was a memorandum of law.

THE COURT: There was a memorandum of law?

MR. KLEIN: There was a memorandum of law.

MR. APPLEBY: The Government consented to the holding of the hearing.

A-8



MR. KLEIN: Aside from the issue of probable cause we have the other issue that it was incidental to an arrest. If an arrest is made out in the street, our contention is that you have no right to go outside of that immediate area and go back into the house and start searching the house.

MR. APPLEBY: I think it was a separate memorandum, your Honor.

Would you like a copy of mine?

THE COURT: Yes, give me a copy.

Did the Government prepare a memorandum?

MR. APPLEBY: We consented to holding the hearing. There is a factual question whether the defendant voluntarily gave up the cocaine. The evidence will show that Mr. Setter voluntarily surrendered the cocaine. It's just a factual question whether that occurred or not.

MR. KLEIN: I don't think it's limited to that. In any event, there would be a submission to higher police authority; it wouldn't be a voluntary surrender.

THE COURT: I'm sorry.

MR. KLEIN: That would be a submission to a higher authority rather than a voluntary surrender.

THE COURT: I don't know.

A-9



MR. APPLEBY: Perhaps I should put on the agents. Before I do that, Mr. Klein's office through Mr. Fisher asked that the Government conduct an all-agency search to determine whether there was any wiretap on the phone of Mr. Setter. The Government has done that, it's contacted the FBI; DEA, Secret Service, IRS, Bureau of Customs; Bureau of Alcohol, Tobacco and Firearms; United States Postal Service; National Security Agency; and the Central Intelligence Agency; and the Government down in Washington made a search of all these agencies and they determined that there was no non-consentual electronic surveillance on Defendant Setter. There was a consentual recording in which an informant wore a body recorder, and Mr. Klein is aware of that.

For the purpose of the record I would like to have this document which is an affidavit from Steven Horowitz, an attorney in the Department of Justice, marked as Court Exhibit and placed in the file?

THE COURT: Court Exhibit offered for identication on behalf of the Government.

You want it placed in the Court file?

MR. KLEIN: I have no objection whether it's in or not.

THE COURT: The Clerk is ordered to file the document.

MR. KLEIN: And the one consentual recording that you referred to, that's the one you furnished me with a transcript?

MR. APPLEBY: That's correct.

At this time the Government calls Sergeant William Rawaod.

THE CLERK: Nine-page document marked as Court Exhibit 1.

THE COURT: Swear in the witness.

(At this point, the witness was sworn in stating his name as Sergeant William Rawaod.)

MR. KLEIN: There is another witness in the courtroom.

MR. APPLEBY: There is another witness but he did not participate in this seizure or arrest.

THE COURT: Do you have any witnesses in the courtroom?

MR. KLEIN: Just the defendant. If the defendant testifies in this type of hearing it's not waiver of his Fifth Amendment right?

THE COURT: I'll allow him to testify without waiving his rights.

A-11



MR. APPLEBY: Except for the purposes of cross-examination, should he take the stand and contradict his testimony or something of that sort --

THE COURT: And if he should commit perjury.

W I L L I A M R A W A O D , called as a witness having been duly sworn by the Clerk of the Court, now seated in the witness box, testified as follows:

DIRECT EXAMINATION

BY MR. APPLEBY:

Q By whom are you employed?

A New York City Police Department.

Q What is your position with the Police Department?

A Presently assigned as a Group Supervisor working with the New York Drug Enforcement Administration Task Force.

Q Is that part of the Drug Enforcement Administration?

A Yes.

Q How long have you been employed by the Police Department?

A A little over nine years?

Q How long have you been Supervisor of the Task Force?

A Approximately five years.

Q Now, do you know the defendant Joseph Setter?

A Yes, I do.

Q Do you see him in the courtroom?

A Yes.

Q Point him out.

A That's Mr. Setter sitting next to counsel table.

MR. APPLEBY: Indicating the defendant, your Honor.

THE COURT: Indicates the defendant.

You may proceed.

DIRECT EXAMINATION CONTINUING BY MR. APPLEBY:

Q Did there come a time when you arrested Mr. Setter?

A Yes, I participated in the arrest of Mr. Setter.

Q What date was that?

A July 3, 1975.

Q Where did that arrest take place?

A Alongside the Setter's residence in Brooklyn.

Q Approximately what time was this?

A Approximately 9:00 a.m.

Q This was outside of his residence?

A Yes, sir.

Q Could you describe Mr. Setter's residence?

A Mr. Setter's is a small bungalow type, one-family home basically, with one floor apartment that Mr. Setter

resides in, I believe consisting of four rooms; and underneath there is a finished basement apartment, that his parents reside in.

Q Where did the actual arrest of Mr. Setter take place?

A Alongside his home where there is a driveway where his venicle was parked.

Q Relate it to Judge Bramwell in as much detail as you can how the arrest took place and what occurred thereafter?

A Sometime a little after 8:00 a.m. in the morning of July 3, 1975, myself and other officers of my group set up a surveillance on the residence of Mr. Setter. We positioned ourselves in three different positions where we could observe his car that was parked in the driveway. At around 9:00 a.m. we observed Mr. Setter leaving his residence and going towards the car. At that time I indicated to the other officers to close in we placed Mr. Setter under arrest. I was the first one to arrive where Mr. Setter was alongside his vehicle. I told him he was under arrest, and I told him who I was and what he was arrested for. I then gave Mr. Setter his rights pursuant to a form which I have issued by the Drug Enforcement Administration.

Q Do you have that form with you today, Sergeant?

A Yes.

Q Do you have it on your person?

A Yes.

Q Could you produce it, please?

(Witness producing form.)

A I have two copies, one in English and one in Spanish. I asked Mr. Setter if he understood English, he said he did, and I read him the English.

Q I would ask that the Clerk mark this as Government's Exhibit 1 for identification for the purposes of this hearing.

THE CLERK: Rights card marked Government's Exhibit 1 for identification.

Q Sergeant, I show you Government's Exhibit 1 for identification and ask you whether you recognize it?

A Yes, I do.

Q What do you recognize it to be?

A It's a Drug Enforcement Administration form 13A, which is a statement of rights.

Q Is that the card that you were reading from when you read Mr. Setter his rights?

A I believe that's the one.

Q Read that card to Judge Bramwell, please.

A It's an oral warnings to be given to a subject

A-15



prior to interrogation and it has the following questions.

Before we ask any questions it is my duty to advise you of your rights; do you understand that you have the right to remain silent?

Q Did you read that to Mr. Setter?

A Yes.

Q What did he say?

A He acknowledged, yes.

Q Continue.

A I would also like to interject at this time whenever I give people their rights, I have them answer me in spoken language rather than just a nod of the head, so I know they understand the English that's read to them.

Next question. Do you understand that anything you say can and will be used against you in court or other proceedings?

Q And what did Mr. Setter say?

A He answered yes.

Next question was do you understand that you have a right to talk to a lawyer before we ask you any questions and to have him with you during the questioning?

Q What did he say to that?

A He indicated yes.

Next question.

A-16



If you cannot afford or otherwise obtain a lawyer a lawyer will be appointed for you by the U.S. Magistrate or the court. We will not ask any questions unless he has been appointed.

Q What did Mr. Setter say about that?

A He said yes, sir.

If you decide to answer now with or without a lawyer you still have a right to stop the questioning at any time or to stop the questioning for the purpose of consulting a lawyer. However, you may waive the right to advice of counsel and your right to remain silent and you may answer questions or make a statement without consulting a lawyer if you so desire. Do you understand your rights?

Q What did the defendant indicate?

A He indicated he did. I said, do you elect to waive them?

Q What did he indicate?

A He indicated yes, he did.

Q Now, after you read him --

Your Honor, I would move Government's Exhibit 1 for identification into evidence just for the purpose of this hearing.

THE COURT: Mr. Klein?

MR. KLEIN: For the purpose of the hearing?

THE COURT: You have to say something for the record.

MR. KLEIN: Yes.

THE COURT: For purpose of the hearing it's received in evidence on behalf of the Government.

THE CLERK: So marked.

Q (MR. APPLEBY CONTINUING) Agent, after you read the defendant his rights and after he indicated he understood them, what occurred?

A After that then Mr. Setter indicated that he would like -- if we could keep it quiet in the driveway and not let his parents who were all residing in the basement of his house know that he had been arrested, or not let any of the people on the street see that he had been arrested. He also requested if he could re-enter his house to, I believe to call his girl friend and feed his cat or call his office or something like that.

Q He indicated something about his cats?

A He indicated something about feeding his cat or having his cat fed. At this time it was my determination that Mr. Setter was cooperating. He wasn't resisting us in any way.

Q Did you search him for weapons?

A At that time he was given a quick pat-down to

A-18



make sure he had no guns or anything.

MR. [illegible]: Is that officer going to be a witness?

MR. APPLEBY: He's a witness but not a witness at this hearing.

A (Continuing) Mr. Setter indicated he would like to go back into his house for the purpose of making a phone call or feeding the cat or something. It was my determination that Mr. Setter was calm and knew what he was doing, and I would allow him to re-enter the house to take care of these matters before going downtown.

Q Incidentally, when you placed him under arrest, did you have your gun drawn?

A Yes.

Q Did the other agents have their guns drawn?

A I imagine so, it's normal arrest procedure.

Q After you patted him down, what happened with respect to the guns?

A I put my gun away.

Q Did the other agents put their guns away?

A Yes. We did n't want to create any commotion in the street for other people to be aware of what was going on.

Q Continue, please.

A We then -- Mr. Setter took keys that he was going

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to open the car with and on the same key ring I believe it was, he opened up the front door of the house and we entered the house.

Q He's the one who opened the apartment house?

A Yes. We entered the house, and I asked Mr. Setter if he had any other cocaine or narcotics -- I forgot the exact words I used -- in the house -- if he did it would be best if he surrended it to us. He said, "Okay". We then went into a back bedroom. In the bedroom Mr. Setter opened up a closet.

Q How did he open it up?

A I believe he just turned the knob and opened it up. I don't believe it was locked or anything, the closet.

Q Continue.

A Inside the closet was a steel file cabinet, four or five drawers, steel cabinet. Mr. Setter using the same key ring that he used to enter the house, opened up the file cabinet and he opened up one of the drawers, I believe it was the second or third, I don't know which. He opened one of the drawers and removed from that drawer a shoe box which contained some white powder and other paraphernalia. He then turned around and surrendered [illegible] Police Officer Herrera (phonetically) who was standing behind him. Mr. Setter then closed the file cabinet and locked it and closed the closet

A-20



door, and we went back out into the kitchen. When we got back out into the kitchen Mr. Setter, I believe he wrote a note to his girl friend and called his office or something. I remember there was something that he had to do to take care of the cats or call the girl friend, or left her a note. I don't remember which it was.

Q You indicated that there was a number of drawers in Mr. Setter's file cabinet that he opened?

A Yes.

Q Did he open up any other drawers?

A No, sir.

Q Did you or the other agents open any of the other drawers?

A No, sir.

Q What happened after you went into the kitchen?

A We went into the kitchen and Mr. Setter made a couple of phone calls, left a note. At this time we, of course, was talking to him about what he had done, and he indicated that he would like to cooperate with the Government and everything else, and again asked us not to let his parents who were very ill know what was going on. He also said he would appreciate -- I believe he said he had one brother who was a fireman and another brother who was a sanitation man, he said he would appreciate if nobody was aware of what happened. In

fact, I believe he called his place of employment while we were there and told them for some reason he wouldn't be there. He said he would appreciate if we didn't let them know what he was arrested for. He indicated he wanted to cooperate with the Government.

Q What did you tell him?

A We said, "Fine, we'll do everything to help you out and not let people be aware of what the situation was" in fact then we indicated to him that we would be leaving and we would go down to 201 Varick Street to process his arrest.

Q Sergeant Rawaod, did you search any part of that house? Did you or any other agents search any part of that house?

A No.

Q Other than what Mr. Setter gave you voluntarily, you didn't conduct any search of Mr. Setter's residence?

A No, sir.

Q Then you went down to Varick Street and processed him, and you brought him to the United States Courthouse for the purpose of the arraignment?

A I didn't, but other agents brought him for arraignment.

MR. APPLEBY: I have no further questions.

THE COURT: All right, cross-examination, Mr.

Klein.

CROSS-EXAMINATION

BY MR. KLEIN:

Q Sergeant, my name is Irwin Klein, I represent Joseph Setter.

Sergeant, you say that you were with the New York City Police Department at the time?

A Yes, sir.

Q And that card that was marked as exhibit 1, the rights card, was that the same card that you had in your possession at that time?

A One just like it. It might be and might not be.

Q May I see that card, please?

(Counsel looking at card.)

Q Sergeant, I invite your attention to the back of the card, the top paragraph and it says "If you cannot afford or otherwise obtain a lawyer and you want one, a lawyer will be appointed to you by the U.S. Magistrate and we will not ask any questions until he has been appointed"; you see that?

A Yes.

Q Sergeant, is it true that the New York City Police card has no reference to the U.S. Magistrate?

A That's correct.

Q And I ask you again, are you sure that this is

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the identical card that you had in which you say you read the rights to the defendant?

A Yes, sir.

Q With U.S. Magistrate on it?

A Yes, sir.

Q And that was furnished you by the New York City Police Department?

A No, sir.

Q Who furnished it to you?

A The Drug Enforcement Administration.

Q Of the federal government?

A Yes.

Q And didn't you have one from the New York City Police Department?

A No, sir.

Q The New York Police Department never furnished you with a rights card?

A They did, sir, but I didn't have it with me at the time.

Q And you said you conducted your surveillance from 8:00 o'clock in the morning -- about 8 until about 9?

A Sometime in that area; yes, counselor.

Q You say you saw the defendant come out of the house at about 9:00 o'clock and you apprehended him alongside

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of his house?

A Yes, sir.

Q How many officers were they?

A I believe it was five or six, sir.

Q Did you all draw your guns?

A I believe so. I was the lead officer and I didn't see -- it's normal practice I would say they probably did.

Q Did you say anything to him?

A Yes. I told him he was under arrest.

Q Did you tell him not to resist?

A No, I don't believe I did.

Q Did you tell him that you would blow his fucking head off?

A No, sir.

Q Did you hear anybody tell him that?

A No, sir.

Q Was he put in handcuffs that morning?

A Yes, he was, sir.

Q Before he left the premises?

A Before we left his house put on handcuffs and a coat was put over his arms so no one would observe the handcuffs.

Q How many times was he put in handcuffs that

A-25



morning at the premises?

A To the best of my knowledge just at the time we were leaving the premises.

Q Did you have him spread-eagled against the car when you told him he was under arrest?

A I don't recall, sir, but I know we did a cursory pat-down search, whether he was against the car or just standing I really don't recall.

Q Did you see a young lady leave the house before he left the house?

A Not that I recall.

Q Were some of the officers in uniform?

A No, sir.

Q Were any federal officers there?

A Yes, sir.

Q Had you ever been in that house before?

A No, sir.

Q And when you described on direct examination that description resulted from hindsight after the arrest, you were at the house; is that right?

A Of the interior?

Q Yes, sir, interior?

A Yes, sir.

Q Did Mr. Setter ask for an attorney?

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A Not that I recall.

Q You testified as to a conversation about other cocaine or other drugs, dope?

A Yes, sir.

Q What were the exact words you said or anybody said in your presence?

A The exact words, I don't recall, but I asked Mr. Setter if he had any other cocaine or any other narcotics in the house and if he did it would be best for him to surrender it to us.

Q Did you tell him what would happen if he didn't?

A No, sir.

Q Did he have any cocaine or drugs with him on his possession when you apprehended him outside?

A No, sir; I don't believe he did.

Q Did you ask him if he had any other drugs in the house?

A Yes, sir.

Q And you used the word "other"?

A I don't know if I did or not, sir. I said words to that effect. I asked him if he had any other -- possibly if he had any cocaine or other narcotics. I might have said, "Do you have any cocaine or other narcotics in the house?".

Q And you asked him to surrender it?

A Yes, sir.

Q Did you demand that he surrender it?

A No, sir.

Q You just asked him politely, "please surrender it"?

A I said if he had any it's best that he surrender it.

Q If he said he had it and didn't surrender it, then what?

A If he had it and didn't surrender it, I would attempt to take the information to a U.S. Attorney and get a search warrant.

Q You mean a Magistrate?

A I would start with the U.S. Attorney to see if I had probable cause.

Q What was his answer when you asked him out in the street, "Do you have any other drugs or cocaine in the house?"?

A I don't recall if I asked him that out in the street. I believe it was when we were in the house that I asked him if he had any cocaine or any other narcotics in the house.

Q Would it be too much -- the witness testified on direct examination that that conversation took place out-

side of the house.

MR. APPLEBY: The defendant said he had to feed his cat.

MR. KLEIN: What I meant --

THE COURT: Let Mr. Le Gendre find it for you and read it back to you.

(Whereupon, the reporter read back a question and answer.)

MR. KLEIN: That conversation apparently took place in the house.

THE COURT: I see.

CROSS-EXAMINATION CONTINUING BY MR. KLEIN:

Q You testified after you placed him under arrest you read him his rights, he then said he wanted to go back into the house?

A That's correct.

Q He told you he didn't want to disturb his parents who were ill?

A That's correct.

Q They were elderly?

A Correct.

Q He wanted to go into the house for a specific purpose?

A It was something about having to feed his cat or

call his girl friend, call his place of employment. I know it was several calls. I remember the feeding of the cat stands out in my mind.

Q And that's a sufficient reason to go back in the house to feed the cat?

A Not the mere fact of feeding the cat; the fact that now I want to show the defendant that I have confidence in him, I let him go secure his premises if he's going to cooperate.

Q You already made a determination before you went into the house, while you were still in the driveway, that he was going to cooperate?

A I felt he would; yes, sir.

Q How long a time passed between the time that you apprehended him in the driveway and the time you went into the house?

A A short period, just a few minutes. I read the rights and we went in.

Q You told us the entire conversation you had with the defendant out on the sidewalk?

A Basically, there might have been some other small details.

Q As I understand it, you arrested him at gunpoint; you searched him?

A I gave him a pat-down, not a complete search.

Q You didn't find any weapons, did you?

A No.

Q You didn't find any drugs or narcotics on him?

A No; not to my knowledge.

Q You read the rights?

A Yes, sir.

Q He said he doesn't want to upset his elderly or sick parents?

A Yes.

Q And he would like to go in the house to feed the cat, is that right?

A In general terms, plus make a phone call.

Q And make a phone call?

A That's correct.

Q And from that you assumed that he might be a proper person to cooperate with your Department?

A Based on everything else I knew about Mr. Setter; yes.

Q Is this the first time you met Mr. Setter?

A That is correct.

Q Mr. Setter went to the back of the house, did all of you accompany him?

A Yes, sir.

Q Was everybody in the same room at the same time?

A To the best of my knowledge; yes, sir.

Q When you told Mr. Setter if you have any other drugs or narcotics -- what did you say?

A I asked him if he had any other cocaine or any other narcotics.

Q Just turn them over to you?

A Just if he did.

Q Did you tell him if he didn't you would get a search warrant?

A No, sir.

Q Did you tell him anything about if he cooperated you would hold him in federal custody rather than turn him over to New York State, which has a life-time statute?

A No, I already made a predetermination this was going to be a federal case. That's why I read the 13A rather than use the police procedure which would go to State Court.

Q If you didn't make that determination you wouldn't have had the other card to read from?

A I might have. If I didn't have it, as I do when I arrest people on State charges I leave out the part about the Magistrate and I say the court will appoint an attorney for you.

Q When did you make this determination that it

would be a federal case rather than a state case?

A Quite a while before, based primarily on the amount of narcotics involved.

Q Were all of the officers in the same room where the closet was located?

A Yes, sir, to the best of my knowledge they were.

Q Do you know if any of the other officers were searching the house?

A No, sir, they wern't, not to my knowledge. I wouldn't allow them to.

Q You suggested to him to surrender any narcotics he had. Did he get it for you and surrender it to you?

A Yes, sir.

Q And what was it, cocaine?

A It was cocaine; yes; and there were other stuff there, I don't know what it was.

Q Did he surrender it to you?

A Yes.

Q At the time he knew that you were a police officer?

A Yes, sir.

Q And he was under arrest at the time?

A Yes, sir.

Q Did there come a point where you asked him to

empty his pockets?

A There probably was a time, I don't recall doing it, but I'm sure there was a time that he was asked to empty his pockets.

Q Were you present when his pockets were emptied?

A Not to the best of my knowledge.

Q Were you in a different room from the others?

A Probably at that time; yes, sir. That probably took place when we were at the Task Force Office where he was being processed.

Q I mean in the house?

A Empty his pockets in the house, I don't recall in the house, emptying his pockets.

Q You mean he wasn't searched in the house or outside?

A Not to my knowledge he wasn't completely searched.

Q Did he ever take out his wallet or billfold?

A I know there was a time he did.

Q Do you know what was told to be done -- what he was told to do with his billfold, his wallet, personal belongings?

A No; I don't recall.

Q Did he feed the cat?

A I don't believe so. I don't recall if the cat was

there or if he left a note for his girl friend.

Q What color was the cat?

A I didn't see a cat. I don't recall seeing a cat.

Q Did you know that he was living there with a young lady?

A I knew he had somebody over to his house at times, whether he was living with the party I didn't know.

Q You say he reached into this file cabinet and picked up this shoe box of cocaine and handed the and handed it over to you; right?

A Yes, sir; handed it over to Police Officer Marero (phonetically).

Q Did you look in any other drawers to see if there were any other drugs or equipment?

A No, sir; I didn't.

Q Was there anything else you found in the house?

A I didn't look for anything.

Q Did you find a scale?

A I don't recall. I don't believe so.

Q Did he get a phone call or did he make a phone call?

A To the best of my knowledge he made a phone call.

Q Do you know to whom?

A No, I know he mentioned calling his place of

employment, and his girl friend, something to that effect. I really don't recall.

Q Excuse me for a moment?

A Sure.

Q Did you ride in the car with the defendant when he was taken to headquarters?

A I don't believe so.

Q Did he hand you the shoe box?

A No, sir.

Q Do you know whether you were still in the closet with the file cabinet when Mr. Setter's pockets were being emptied in the kitchen?

MR. APPLEBY: I don't believe that was the testimony.

Q Do you recall when his pockets were being emptied?

A No, sir.

Q You don't recall that at all?

A No, sir. In response to your question it was at no time that Mr. Setter was in the kitchen and I was at the closet. I was with Mr. Setter at all times while we were back in the back bedroom.

MR. KLEIN: I have no further questions of this witness.

THE COURT: Any re-direct?

MR. APPLEBY: No, Sir.

THE COURT: Thank you, Sergeant Rawaod.

MR. APPLEBY: The Government has no further witnesses.

The Government rests.

MR. KLEIN: Take the stand.

J O S E P H L . S E T T E R , called as a witness having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. KLEIN:

Q Do you re all the morning of July 3, 1975?

A Yes, sir, very well.

Q And where did you sleep the previous night?

A In my bedroom.

Q Did you have anybody else keep you company there that night?

A I live with a young lady who I had been living with prior to when it happened.

Q Did she leave the premises at any time that morning?

A She left earlier because her uncle had deceased and she was going to his burial. As a matter of fact, one of

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the officers had commented we wanted to wait for your girl to leave before we did anything.

Q When was this said to you?

A Upon the arrest, while we were still outside.

Q Which officer said it?

A It was six on top of me.

Q Was it the Sergeant or one of the others?

A I couldn't swear to it.

Q In other words, they acknowledged that they had seen the young lady with you?

A Yes, sir.

Q About what time did she leave?

A She left about fifteen minutes before I had left myself.

Q Do you have a cat?

A Yes.

Q Did you feed the cat before you left the house?

A Yes, I did. I was going to my place of employment, that's why my house was locked and I was leaving.

Q It's customary for you to feed the cat before you leave?

A Yes.

Q When you go to your place of employment, are you away the whole day?

A I was going to go away, I was going to my place of business to see that things were in order and at that particular point I would go away.

Q What kind of business was that?

A Used car lot.

Q Can you tell us what happened that morning when you left the house?

A From when I had gotten up or when I got outside?

Q When you had gotten up, what happened?

A My girl friend had gotten herself ready to go to her uncle's burial and I had gotten myself ready to go to my office to take care of matters, business; naturally I feed the cat when I get up, and I took care of all my necessary business; I showered, got ready, took my belongings with me, left my premises to go out to my car to go to my place of business and upon doing so I heard my name called, I turned around, I was about the center of the driveway. I turned around and from just about all in one direction there were six men who I learned to be agents were on top of me with guns drawn. They had the guns out as they were coming at me, I just froze. I don't have to tell you that I was scared. They said "Don't try to run" -- I don't know if I may use the language.

THE COURT: Sure.

A (Continuing) You better not try to run or I'll blow your fucking head off." I said, "I'm not going to give you any resistence." I said, "Do me a favor, my parents are 75" I didn't want to give them a jolt. Upon this he told me that I was arrested. I did not get my rights, no question about that either. I was demanded at gun point to go into my house and I went into my house.

Q You said you were not given your rights. At any time were you given your rights that day?

A After everything had taken place we were on the way to the Varick Street and upon arriving at the Belt Parkway, being in the car business, I know I was driving a '71 Pontiac with two gentlemen in the front, myself in the back. They said, "Did you get your rights"? I said, "No". He took out that little yellow card.

THE COURT: Similar to Government's Exhibit 1 in evidence.

THE WITNESS: Yes, Sir.

THE COURT: A card similar to that?

THE WITNESS: Yes, Sir.

THE COURT: Continue.

THE WITNESS: He handed me the card over the back seat, like this (indicating). He said, "Here, read this". I took it. I read it. After I looked at the back of

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it, to the best of my recollection it's written in Spanish, the card that I was reading. I handed it back to him and they proceeded to question me.

Q Was that the first time that you had been advised of your rights that morning?

A Yes, sir.

Q Were you advised of your rights in the driveway on the house or in your h

A No, sir.

Q Now, you say they told you to go back into the house at gunpoint?

A Yes, sir.

Q You volunteered "I would like to go back in the house, I'd like to feed my cat"?

A The only thing I said, I didn't want my parents alarmed. I did say at a later time I wouldn't want my brothers contacted, not to embarrass me.

Q When you went back in the house with the guns were the guns still drawn?

A Some were and some weren't.

Q And did you go back to the house in submission to police authority?

A Yes, sir. I was told if I knew what was good for me to be quite honest I was asked if I had any weapons.

At this time they proceeded to open my rolltop desk, old antique scale inside by my desk, went through some drawers. The Sergeant with all due respect, he went into my bedroom and was pulling on that closet door -- "We are not here because somebody likes you" and he was tugging at that door. I was standing in the kitchen. I said, "Please, just give me a minute to compose myself". I said "I've been terribly jolted" and with this I went down, I sat down in the living room and he was still pulling on the closet door. He said, "Open this fucking door or I'll tear this house apart, then we'll get a search warrant". At this particular point I did what was best for me to do, and that was to give it to him.

Q What did you do?

A I handed him the box and he handed the box to Officer Marero (phonetically) and said "Here, this is your bust". They took me into the kitchen, had me empty my pockets. I put my things in the drawer, my wallet included, which I was handed later on at Varick Street. The only thing I had with me because they permitted me to go to the rear of the house and ask my mother for a $5 bill because I left everything in the house.

Q In other words, you left your money and your wallet and everthing in the kitchen?

A My jewelry, everything I had on. I don't think

I had a watch on.

Q Sometime later in the day, did you see your wallet again?

A I was handed my wallet during questioning.

Q At Verick Street?

A Yes.

Q And the last time before that it was in the kitchen left in the drawer in the kitchen?

A Yes. The only time I did receive a call, Mr. Klein, was upon my arrest, somebody did call me. I called no one. I had no one to call.

Q Did you voluntarily give this box to the police or did you submit to police authority when they demanded it?

A I submitted to police authority, Mr. Klein.

Q Did you notice any of the officers searching different portions of the house?

A Yes, sir.

Q Did the Sergeant say to you in the driveway, did he ask you if you had any other drugs or cocaine in the house?

A No, they allowed me to go into the house at first.

Q When was the first time there was any conversation about drugs or narcotics?

A Once they were in the house, as they were

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proceeding to open the drawers they were looking through, and at that particular time they said if you have anything get it up, bring it out.

Q They told you if you didn't open the drawer of the closet where the file cabinet was he would bust it down?

A I was constantly reminded I would get my fucking head blown off. I kept insisting I wasn't going to do anything and I wasn't going anywhere.

MR. KLEIN: I have no further questions.

THE COURT: Cross-examination?

MR. APPLEBY: No questions.

THE COURT: Mr. Setter, you said the officers were searching different portions of your house?

THE WITNESS: Yes, Sir.

THE COURT: Where were they searching?

THE WITNESS: While I was standing in the kitchen one officer had gone into my rolltop desk. They opened the desk and he said to the other officer, "Look what I found" looking at the old scale; the other officers proceeded to go through some of my drawers.

THE COURT: What did he find?

THE WITNESS: Little old antique scales; another one went into the linen closet; another one went into the other closet where I have a little bar set up.

They kept looking through my drawers and my closet. The Sergeant went to my back door in back and came out.

THE COURT: That's Sergeant Rawaod?

THE WITNESS: And was tugging on the door, the door was locked.

THE COURT: The back door?

THE WITNESS: I had to get keys to open that back door.

THE COURT: Where was the location of this file that the Sergeant spoke about?

THE WITNESS: Inside the closet.

THE COURT: Which closet?

THE WITNESS: It's like a little walk-in closet, I just keep my junk in there.

THE COURT: Where is this located?

THE WITNESS: In the bedroom.

THE COURT: Back bedroom?

THE WITNESS: Yes.

THE COURT: Who found this file?

THE WITNESS: I don't understand.

THE COURT: Was the box in a file? He described three or a four-door file.

THE WITNESS: The closet had the file.

THE COURT: Who found this? Did you go there or

did he go there?

THE WITNESS: I was told to get it out.

THE COURT: Did he go there before you went --

THE WITNESS: Yes, he was pulling on the door to see if it was open.

THE COURT: What did he say to you?

THE WITNESS: He said, "Open this fucking door or we'll take this beautiful apartment apart."

THE COURT: What did you do when you went there?

THE WITNESS: When I went to the door?

THE COURT: When you went to the file, what did you do?

THE WITNESS: I opened the closet door. I opened the file which both were locked. I reached into the drawer. I took this new shoe box out and handed it to the Sergeant; the Sergeant was directly behind me.

THE COURT: What happened after that?

THE WITNESS: He turned around and handed the box to I believe --

THE COURT: To another police officer?

THE WITNESS: Yes; and at this time said "This is your bust".

THE COURT: And what else happened?

THE WITNESS: At that particular point I closed

the drawer, I locked the closet.

THE COURT: Did you lock the file?

THE WITNESS: No.

THE COURT: Was it locked when you went to the --

THE WITNESS: Yes.

THE COURT: Did you lock it after that?

THE WITNESS: Not as I left.

THE COURT: Now, did they look in any more of those file drawers?

THE WITNESS: No.

THE COURT: They just let you take the box out and give it to them?

THE WITNESS: Yes, Sir.

THE COURT: Now, the other thing is this; from the time you went into that house until the time you left, what period of time took place; how long did it take; how long were all of you in the house?

THE WITNESS: I would say approximately, maybe ten minutes.

THE COURT: Maybe ten minutes?

THE WITNESS: When I had left the house, your Honor, I had looked at the watch, I had to be at my place of employment at 9, and I think it was ten minutes to nine to be quite exact, when it was time to leave it

was nine -- after nine. It was in that period of time.

THE COURT: Did they search any other portion of the house?

THE WITNESS: Just my apartment.

THE COURT: Just your apartment?

THE WITNESS: Yes.

THE COURT: Is there a kitchen in your apartment?

THE WITNESS: Yes.

THE COURT: Did they search the kitchen?

THE WITNESS: They looked in the drawers.

THE COURT: Which drawers?

THE WITNESS: The drawers where I had silverware and junk.

THE COURT: Were you with them when this was done?

THE WITNESS: I saw them go into my rolltop desk.

THE COURT: Which room is the rolltop desk in?

THE WITNESS: Like an adjoining dining area; the desk is here.

THE COURT: Anything further?

MR. APPLEBY: No, your Honor.

MR. KLEIN: No, your Honor.

THE COURT: Thank you, you may step down.

MR. KLEIN: At this time I respectfully move to

suppress.

THE COURT: Do you wish to put anything on?

MR. APPLEBY: This is a question of credibility, Mr. Setter's word against Sergeant Rawaod's.

MR. KLEIN: I move to suppress the evidence on the grounds that the police officers had no right to search the house; the arrest was made out on the street; the search was made in the house; the handing over of the box; under those circumstances could not be considered voluntary. He submitted to superior police authority, six police officers with guns drawn. At one point all six had their guns drawn; at other times some had their guns drawn. He was under arrest. These police officers made certain even if he wasn't handcuffed at the time that they were in sufficient control of the situation; that anything that he would do to try to escape would have been foolish.

On credibility, the story about the cat which the police sergeant brought up, seems logical that it's a matter of habit to feed a pet at about the same time each day -- for this man to go to work in this used car lot he would feed the cat in the morning and he did it this particular morning; also it would be no need to say I want to come back in the house to feed a cat.

We have the situation of a young lady who left the house earlier and she would be a witness in the trial; and if your Honor feels that that's important I would ask for permission to testify that she slept there.

MR. APPLEBY: I will stipulate to that.

MR. KLEIN: She left the house shortly before.

THE COURT: This is prior to the time of the arrest?

MR. KLEIN: Yes; about fifteen minutes.

THE COURT: For purposes of this hearing, it doesn't have any particular effect unless you feel that there is some issue or some point, and some reason why you want to get her testimony on; that's up to you, but I have no feeling one way or the other. It's up to you what you want to do.

MR. KLEIN: The only point that she could make, she left the house about a quarter to nine.

THE COURT: That's conceded. It doesn't seem they saw her. It's conceded that she was not there at the time.

MR. KLEIN: At the time she wasn't, but for the credibility of the police sergeant, she left the house.

THE COURT: Or the credibility of the police

sergeant, did he have to see her?

MR. KLEIN: Six police officers have a house under surveillance for an hour and they don't see her coming out and leaving?

THE COURT: Then he had to see her if that was the case.

MR. KLEIN: There is no right to search the house, the arrest was made on the street and it's not in the immediate area. Even if an arrest is made in one room, you don't have the right to search the rest of the house. I say it was not a voluntary gesture. The man was surrounded by police officers and it was a submission to police authority. I say it was an unlawful search and seizure, and I respectfully request that the evidence be suppressed.

THE COURT: I'll hear Mr. Appleby.

MR. APPLEBY: Mr. Klein keeps talking about a search; there was no search. Mr. Setter handed over the cocaine to the agents. Sergeant Rawaod was under the impression that Mr. Setter wanted to cooperate, that was a reasonable inference that he drew. Mr. Setter said he wanted to keep everything quiet, don't let my friends know or people on the street know. Mr. Setter wasn't offering any resistance. It was a reasonable

assumption; everything in the scenario of this arrest, his cooperation -- it was Mr. Setter who asked if he could go back into the house; Sergeant Rawaod didn't say he was sure, something about leaving a note for his girl friend. Mr. Setter said he wanted to go back in the house, the agents didn't tell him we are going back into the house. It was Mr. Setter who took the key chain out of his pocket and opened the door to the house. It was Mr. Setter who went to his bedroom and opened up the cabinet, he again used the key that he had on his person to open it up. The agents didn't open any other drawers to the cabinet, they didn't search in any other part of the house; for everything in the case that the defendant indicated that he may have wanted to cooperate. Obviously now he's changed his position. At that time Sergeant Rawaod was under the impression that he wanted to; everything indicated voluntariness and consent. Mr. Setter gave the agents the narcotics. It's a question of credibility, either believe Mr. Setter or Sergeant Rawaod.

THE COURT: Are the fruits of this search, the cocaine which is alleged in the indictment?

MR. APPLEBY: Yes, it is, your Honor.

THE COURT: That's what's alleged in the indict-

ment?

MR. APPLEBY: Yes, your Honor.

THE COURT: Anything further, Mr. Klein?

MR. KLEIN: On the question of credibility, it's unlikely in my opinion that a short arrest outside a matter of two minutes, the conversation that the Sergeant testified to, that the Sergeant would get the idea in his mind that this man was going to cooperate.

THE COURT: You may continue.

MR. KLEIN: That was my point.

THE COURT: What is your point?

MR. KLEIN: On the question of credibility, it doesn't sound plausible with this type of arrest and limited conversation that took place, as the Sergeant testified to, that he could get the idea in his mind that this man was going to be a cooperating witness.

THE COURT: Anything further, Mr. Appleby?

MR. APPLEBY: No.

THE COURT: I reserve decision. I'll take a short adjournment.

(Whereupon, a short recess was had.)

(After recess.)

THE COURT: The Court has not arrived at a decision.

Is Officer Marrero here? (phonetically)

MR. APPLEBY: He's on his way from Grand Jury, Nassau County Office, I'll have to call.

THE COURT: He was not in court during the time the testimony was taken; he was not present?

MR. APPLEBY: We have another officer.

THE COURT: Was he present in court?

MR. APPLEBY: No.

THE COURT: Is he here? The Court would want at least one other officer who was present at the time of the arrest.

MR. APPLEBY: While we are waiting, there was a Kerr recording in which Mr. Rosenberg and the defendant overheard, I provided that cassette to Mr. Klein; only part of that recording was transcribed and right now there are a couple more minutes, as soon as that's done -- it's being done, I'll give that part to Mr. Klein.

MR. KLEIN: This has nothing to do with this hearing.

THE COURT: He's just saying what he's done concerning something else within the case. It has nothing to do with the hearing, as f r as I know.

MR. KLEIN: No.

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MR. APPLEBY: Your Honor, this is Agent Ebert.

THE COURT: Swear in the witness.

M I C H A E L E B E R T , called as a witness having been first duly sworn by the Clerk of the Court, testified as follows:

THE COURT: You may proceed, Mr. Appleby.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q By whom are you employed?

A United States Department of Justice, Drug Enforcement Administration.

Q How long have you been so employed?

A Five years.

Q Do you know the defendant Joseph Setter?

A Yes, I do.

Q Do you see him the courtroom?

A Yes.

Q Point him out.

A The man in the blue shirt and the blue and gray sports coat.

THE COURT: Indicating the defendant.

Q I would like to direct your attention to July 3, 1975, were you on the arresting team that arrested Mr. Setter?

A Yes, I was.

Q Where did that arrest take place?

A It took place alongside his house, 54-16 Glenwood Road in Brooklyn.

Q You were with Sergeant Rawaod?

A Yes, I was.

Q Just tell us in a narrative fashion exactly what occurred at the time of the arrest?

A All right. We observed Mr. Setter coming out of his house, and at this time we believed that he was leaving for wherever he was going to go that day; he was going to his automobile. At that time the Sergeant indicated we should place him under arrest; myself, the Sergeant arrived at approximately the same time by Mr. Setter. The Sergeant told him he was under arrest and told him what it was for; he indicated to him his rights.

Q Was he reading from a card, if you recollect?

A Not that I remember.

Q Could he have been?

A Yes.

Q What rights do you recall him telling him?

A He told him he was under arrest and what the violation was for; he was required to say anything, if he did say anything it could be used against him, and he had a right to an attorney before he made any statements.

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Q Did he say anything with respect to the appointment of a lawyer if he could not afford one?

A Yes; at that time we asked him if he was leaving for the day, he said, "No" he wanted to go back in the house before we took him downtown.

Q Did he indicate that he originally wanted to go back into the house?

A Yes. He said he wasn't actually ready to leave, he was going to get something out of the house and take it back in the house.

Q Go ahead, tell us what happened after that?

A He said he had to lock the house up and do a few minor things before he left.

Q Did he say anything about a cat?

A I believe so. I believe he said he had to feed his cat or give it some milk, something like that. At that time we went back to the house, of course his being arrested we had to accompany him wherever he went.

Q When the arrest was taking place did you all have your guns drawn?

A It's common practice, we don't know what the subject is liable to do as a reaction.

THE COURT: Let him tell us what happened in the house.

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THE WITNESS: Went back into the house, it was myself, the Sergeant and a couple of other officers; and we walked around the house with Mr. Setter taking care of whatever chores he had to take care of.

There came a point where the Sergeant asked him if had any drugs in the house to which Mr. Setter said, "Yes". The Sergeant said, "Will you please surrender them to us at this time" and he voluntarily said, "I will". He then went into his bedroom and into a closet in the bedroom and opened the closet door, and he had a file cabinet in that drawer and in the closet, three or four drawer cabinet, which was locked, he took the keys out of his pocket and opened the file cabinet, took a shoe box out of the drawer and gave it to us.

Q Incidentally, did you see a girl leave his house at any time?

A Yes; before, about a half hour, fifteen minutes before we arrested him, a woman did come out of the house and leave. She had her own car which was parked in front of the house and she left the area.

Q Did you ever find out who that woman was?

A I believe that was his girl friend.

Q Now, the defendant got the shoe box out of the cabinet; is that correct?

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A Yes.

Q What did he do with it?

A He turned around and handed it to one of the officers, I believe Officer Marrero (phonetically).

Q And after that, what occurred?

A The Sergeant asked him if that was all the drugs that were in the house, he said, "Yes". At that point he closed the file cabinet back up and locked it and closed the closet, and then proceeded to secure the house, make sure the doors and windows were locked and shut off the electricity, and whatever else was on inside the house. At that point we took him outside and myself and Investigator Boss drove Mr. Setter down to the office to be processed.

Q Going back to the time you arrested him in the street, did he indicate anything with respect to keeping things quiet?

A Yes. We asked him about that house because it appeared from -- that there was other living quarters downstairs. He said his parents lived down there, they were invalids, he didn't want them to know what was taking place. He also indicated to us that he was considering cooperating which would be further incentive for us to keep the arrest as quiet as possible.

Q Now, did you have your guns drawn inside of Mr.

Setter's residence?

A Once Mr. Setter was placed under arrest and it was obvious that he wasn't going to offer any resistance, then the guns were put away.

Q Had you patted him down previous to his entering the house?

A Not in the house.

Q Previous?

A When we initially confronted him, yes. They were just displayed, no one took aim at him.

Q When you left the house with him, was he in handcuffs?

A Yes, while he was in the house he had the handcuffs; once we put him in the car we had handcuffs on him then.

Q Was anything placed over the handcuffs?

A I think we put the handcuffs on him when we got in the car, I'm not positive. He was in such a manner we escorted -- if the handcuffs were on before the house it was in such a manner that they were very obscure, they couldn't be seen too readily from anyone passing on the street.

Q Was that his request?

A Partially, and we hoped that he would be induced to cooperate with us.

Q Did the defendant make any telephone calls or

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receive any telephone calls while he was inside the house?

A As far as I know he may have made one or two calls.

Q Do you recall who the telephone calls were to?

A I believe he called his place of business and told them that he wouldn't be in; he might have called his girl friend.

Q When you had him in the car and while taking him to the Task Force Headquarters, were you in the car with him?

A Yes, sir.

Q Where was the defendant seated?

A He was seated in the back seat. It was a two-door car. We were both in the front, myself and my partner.

Q And he was the only one in the back?

A Yes.

Q Did anyone hand to him a card?

A I handed him DEA13 which had his rights on them, and I asked him if he could read, he said he could.

Q Was that form in Spanish or English?

A English. He read the rights. I asked him if he understood them all, he indicated that he did.

Q Did you or any other agents who was present at the time search Mr. Setter's house looking for contraband?

A No. The only search that took place is when

agents make sure, since he didn't have handcuffs on him -- just to make sure there were no knives if he took it in his mind to offer any resistance.

Q Did any agent or yourself open a rolltop desk and take out a triple beam scale or some kind of scale?

A Not that I remember.

MR. APPLEBY: No further questions.

THE COURT: Cross-examine, Mr. Klein.

MR. APPLEBY: Incidentally, did you know that you were going to be called until about a minute ago when I called you in my office?

THE WITNESS: No, I didn't.

THE COURT: You didn't speak to him prior to his speaking to you on the stand? At this point the Court saw it, you just came in the court and he didn't speak to you prior to getting on the stand and he didn't know he was going to be called.

Mr. Klein?

CROSS-EXAMINATION

BY MR. KLEIN:

Q Agent Ebert, you know the police sergeant, don't you?

A Yes, he's the group supervisor.

Q And have you discussed the case with him before

testifying here today?

A How do you mean that?

Q Have you gone over the facts with him and have you discussed it with him over a period of time?

A We discussed the facts, it was coming to trial.

Q Had you discussed over a period of time the events leading to the arrest of Mr. Setter?

A Not until just recently; no.

Q You never talked to the Sergeant about this case after the arrest?

A We have other cases that we are taking care of. We don't have too much time for something that is already finished until it comes time for trial.

Q You testified before the Grand Jury?

A Yes, but not -- that was quite a while ago.

Q Have you seen your Grand Jury testimony lately?

A No.

Q Do you know if the Sergeant testified before the Grand Jury?

A I believe he did.

Q Have you been shown a copy of his Grand Jury testimony?

A I have not.

Q Anybody in the U.S. Attorney's office asked you

your version of what took place on the arrest that day?

A Not until just now.

Q But the U.S. Attorney has called you as a witness, and you say he didn't know that you knew about the arrest?

A Let me straighten this out. I understood that I possibly could be called as a witness to testify concerning the events surrounding the arrest and the seizure, and on the other exhibit and that's all.

Q Have you discussed your testimony with the U.S. Attorney?

A Not until he just asked me the questions a few minutes ago.

Q Now, when you were leaving in the car, after you left the house and you were taking Mr. Setter down to your Headquarters, did you ask him whether he had been advised of his rights yet?

A I was standing there when the Sergeant gave him the rights. As best as I can remember right at the moment of arrest.

Q But you also gave him a card in the car?

THE COURT: He said that.

Q And is it customary to give him the rights twice?

A It's insurance it's an insurance policy. In other words, he can't say he never saw his rights or didn't know what they were. I gave him the card to read. He said -- first of all he told me he could read and he finished reviewing the card, it took about thirty seconds. I asked him, "Do you have any questions? Do you understand all your rights?" He said, "Yes, I do." He gave me the card back.

Q Do you recall when the Sergeant gave him his rights earlier?

A When we placed him under arrest.

Q Did the Sergeant recite the rights to him, or did he give him a card to read, or did the Sergeant read verbatim?

A I was trying to watch what Mr. Setter was going to do. I don't remember whether he read them off the card or from his memory, but he did advise him of some, if not all of the rights.

Q What are the rights that he advised him of, he had a right to have an attorney; is that correct?

A Yes.

Q And you said Mr. Setter responded that he couldn't afford an attorney; is that what you said?

A I never heard that. I never said that.

Q I thought I heard something like that.

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A No, sir.

Q Where did the conversation take place about drugs or narcotics?

A Pertaining to when?

Q Would it was in the house or outside?

A You are talking about what drugs now?

Q The particular drugs in this case?

A There are a number of exhibits, they weren't all obtained on one day.

Q I believe you testified that when you came into the house the Sergeant said, "Do you have any drugs or narcotics?", is that right?

A Once we were inside his house; yes, we did.

Q Where did that conversation take place, inside or outside the house?

A Inside the house.

Q What was the reason Mr. Setter gave for going back in the house?

A He stated that he was placing him under arrest and we stood outside for a couple of minutes while this was taking place; that he wasn't ready to leave yet and, of course, we didn't know that he wasn't ready to leave. We felt when he went to his car, we thought he was going to leave. We don't want to try and arrest somebody in their car, in a

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moving vehicle. We decided to arrest him at that point. He then advised us he hadn't secured his house, he wanted to go back inside, feed his cat, make a telephone call and secure the house; so we said, "Okay" and went back into the house with him.

Q With your guns still drawn? Were your guns still drawn in the house? Did any of you still have guns drawn in the house?

A No.

Q When did you put your guns away?

A As soon as Mr. Setter was secured; as soon as he did not offer any resistance. We told him we were the police, it was three, four, five officers there, and he knew who we were. We showed him our identification and so on, and he said, "I'm not going to do anything". We said, "Okay, fine".

Q Was there an occasion where you or the Sergeant went to a closet door that wasn't open?

A No, sir. He went to the closet door; the Sergeant said, "Where are the drugs?" He said, "I'll show you" words to that effect. We followed him into the bedroom, he opened the closet door of his own accord with his own key.

Q In the presence of how many police officers?

A Three or four.

Q Six?

A It might have been six. The whole thing I can't remember, it was three or four of us right in the room.

Q Were any drawers open any part of the house?

A What do you mean? Were any drawers standing open or opened by us?

Q Or any of you?

A Not that I know of.

Q Was any search made for anything in any part of the house?

A Like I said, only to see if there were any weapons lying around that could be grabbed by Mr. Setter.

Q What kind of search was made for that?

A Just an eyeball search.

Q Just what was lying out in open view?

A We had at least two men standing next to Mr. Setter at all times, if he wanted to grab for something they would be able to stop him.

Q Was the rolltop desk open?

A No, I believe it was locked.

Q Was Mr. Setter relived of the contents of his pockets?

A Yes, down at the office. In other words he was patted down to make sure he didn't have any weapons on his person; his wallet and things like that were kept by us until

he was taken to court.

Q When did you get possession of his wallet, other things in his pocket?

A I think his wallet was taken out when he was first arrested, and then we gave it back to him until we got back to the office.

Q You got the wallet outside in the street or in the house?

A I'm not certain whether it was outside or inside but we did look at it.

Q Was the wallet and other belongings placed in a kitchen drawer?

A I really don't remember.

Q Was there any money in the wallet?

A Not that I know of.

Q Were you in the room where the file cabinet was at the time the file cabinet was open?

A Yes, I was.

Q When did you first put handcuffs on him?

A As near as I can remember when we were leaving the house.

Q This was July 3?

A Right.

Q What was he wearing in the upper portion of his

body?

A I think he had a long-sleeved shirt on.

MR. KLEIN: I have no further questions.

THE COURT: Mr. Appleby?

MR. APPLEBY: No.

THE COURT: Thank you, Agent Ebert.

MR. KLEIN: Mr. Setter, were you wearing a long-sleeved or short-sleeved shirt?

SERGEANT SETTER: A short-sleeved shirt, it was July 2, it was to be a very warm day. If I may say so, I participate in weight lifting so I wear short sleeved shirts.

THE COURT: Yes, Mr. Klein?

MR. KLEIN: I renew the motion and now I point out it seems to me a crucial inconsistency in the testimony of the police officer and the special agents, and that is the police officer testified that the conversation as to where are the drugs, do you have any other drugs or narcotics took place outside the house.

THE COURT: Neither one did that, you're mistaken. In fact when Sergeant Rawood was on the stand that's the very question you had Mr. Le Gendre check in the minutes.

MR. KLEIN: Inside of the house?

THE COURT: By both of these witnesses --

MR. KLEIN: That's the fact established now, that conversation took place in the house?

THE COURT: Yes.

MR. KLEIN: Now, I'm saying that since the arrest was outside, there was no probable cause to enter the house. If they were in the house, then they first found out that there were drugs and narcotics there in response to a question, and then in submission to police authority he gave him that envelope, then he produced it; so I say it's not a lawful search or seizure, and it's certainly not a voluntary surrender, not when you are under arrest.

THE COURT: Mr. Appleby.

MR. APPLEBY: I think it's perfectly clear that it was a voluntary surrender. Agent Ebert corroborated the entire testimony of Sergeant Rowaed, and one inconsistency whether there was a cat present; Ebert said he wasn't sure because he was watching Setter. There was no rehearsal, there was no discussion about his testimony beforehand. I think the issue is credibility, and I think it's clear that Mr. Setter wasn't being candid on the stand.

THE COURT: This is true, and the Court was

impressed with the way Agent Ebert gave his testimony. Agent Ebert was called because the Court was not satisfied that there was enough in the hearing for the Court to make a decision; and Agent Ebert was not spoken to before coming in the court and it was anticipated that he would be called, but it wasn't expected, and he just came in and he gave testimony which in effect corroborates what Agent Rawaod testified what Sergeant Rawaod testified to.

The motion to suppress is denied and that's as much as the Court can say, it's a factual issue and the Court believes the testimony given by Sergeant Rawaod and Agent Ebert and it's credible and believable.

MR. KLEIN: I say that aside from the issue of credibility that even if it's credible and believable still as a matter of law there is no justification for seizing the cocaine.

THE COURT: From the testimony that the Court received from the Agent and Sergeant Rawaod, it appears that the defendant invited the police officers into his house because at that point the defendant had been arrested. The defendant was in the custody of these policemen and wherever he went at that point, they had to go. They went into his house with him for purposes --

from Agent Ebert's testimony -- for purposes of his securing the house and having care of a few things, and Agent Ebert came in and said he claimed he house had not been secured at that point, and he was coming out to the car. It was a voluntary turnover by the defendant of the cocaine in connection with this particular case.

This was voluntarily done by the defendant. The motion to suppress is denied. We'll pick a Jury this afternoon.

MR. APPLEBY: Very good, your Honor.

THE COURT: Thank you.

(Whereupon, the suppression hearing was concluded.)

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GOVERNMENT'S OPENING

We will now have the opening statement of the prosecutor.

MR. APPLEBY: Thank you.

(Mr. Appleby makes an opening statement to the jury on behalf of the United States of America as follows:)

MR. APPLEBY: Mr. Klein, your Honor Judge Bramwell and ladies and gentlemen of the jury:

This case involves the direct sale by the

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defendant Joseph Setter to a Federal Narcotics Agent. The sale came about as a result of the introduction of the Agent to the defendant by a former associate of the defendant, Joseph Setter, and who knew Joseph Setter to be dealing in cocaine and who, unbeknownst to the defendant, was cooperating with the Federal Government.

Now, the name of this individual, the informant, was Harvey Rosenberg. The cooperation of Mr. Rosenberg came about as a result of the fact that he himself had been arrested by the Federal Agents for sales of cocaine. And Mr. Rosenberg, in order to obtain leniency from the Government, agreed to cooperate with the agent in finding and locating sources of supply of cocaine.

Now, the investigation of Mr. Setter began on April 10th of 1975. At that time Mr. Rosenberg in cooperation with the agents and in the presence of the agents made a telephone call to the defendant Joseph Setter at his place of business, Exclusive Motors, which is a car dealership in Brooklyn.

At that time Mr. Rosenberg placed a call to Mr. Setter and asked him whether he is willing to

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sell narcotics, cocaine, that is to be bought by the Federal Agent. Of course, in this conversation he didn't reveal the fact that his buyer was a narcotics agent.

Now, as a result of that conversation--and, incidentally, ladies and gentlemen, that phone conversation was taped and recorded and you will hear it played in this courtroom today.

But as a result of that telephone conversation a meeting was arranged between Mr. Rosenberg and Mr. Setter to take place at Mr. Setter's residence, which is located at 54-16 Glenwood Road in Brooklyn.

On April 17th, a week later, Mr. Rosenberg met the agent at the New York Joint Task Force, which is a part of the Drug Enforcement Administration of the Government. He met the agents at the office. And at that time, because Mr. Rosenberg and the defendant were dealing between themselves at that time, the agents decided to wire Mr. Rosenberg with a body transmitter. This transmitter would allow the agents to hear the conversation and the meeting between Mr. Rosenberg and Mr. Setter that was to take place.

On April 17th the agents and Mr. Rosenberg

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went to Mr. Setter's residence on Glenwood Road. Mr. Setter--excuse me, Rosenberg left the car of the agent's and went to Mr. Setter's residence. At this time he is wearing the recorder and the agents are overhearing now the conversation between Mr. Setter and Mr. Rosenberg inside of Setter's residence.

At that time Setter informed Rosenberg that Rosenberg's buyer could purchase 1/8th of a kilogram for $4800.

Rosenberg then left Mr. Setter's residence and walked back to where the federal agents were waiting for him around the corner and told him that Setter was willing to sell an eighth of a kilo for $4800.

The agent gave Rosenberg money. Rosenberg went back to Setter's residence and Setter gave Mr. Rosenberg the eighth of a kilogram and Rosenberg walked out and gave them the eighth of a kilogram of cocaine.

This was done under full knowledge of the agents. A recording was made with a Kel set recorder. You will hear that recording in the courtroom either today or tomorrow.

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Now, during the meeting with--between Mr. Setter and Mr. Rosenberg on that date, April 18th, Mr. Setter agreed to meet Mr. Rosenberg's friend, who unbeknownst to him was the narcotics agent, because he was interested in increasing his lucrative narcotics business.

So a meeting was arranged for April 24th, 1975 at the Grotta D'Oro Restaurant, in Brooklyn, Flatbush Avenue. And at the Grotta D'Oro Restaurant Mr. Rosenberg introduced Mr. Setter directly to the Federal Agent. They had a meeting there and there Mr. Setter agreed to sell to the agent quantities of cocaine.

Mr. Setter gave the agent--of course, he didn't know he was an agent--his telephone number at his home and at his business.

You will hear, ladies and gentlemen, that as a result of the telephone call between the agent and Mr. Setter, a meeting was arranged between Setter and the agent for April 28th, 1975. And on that date the agent went to Mr. Setter's residence, went into the house; he gave him $5,500 and Mr. Setter gave him an eighth of a kilogram of cocaine again.

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Later, ladies and gentlemen, on July 3rd, 1975, Mr. Setter was placed under arrest by the narcotics agents in front of his home on Glenwood Road. And at that time the agents made another large seizure of cocaine from the residents of Mr. Setter.

Based upon this evidence, ladies and gentlemen and for no other reason, at the conclusion of the case the Government will ask you to return a verdict of guilty.

THE COURT: Thank you Mr. Appleby.

Mr. Klein, if you wish, you may make an opening statement.

MR. KLEIN: I wonder if I may on permission, to reserve any opening I make--

THE COURT: You can't reserve it. If you can't make it now, you waive it.

MR. KLEIN: I must make it now? I waive it then.

THE COURT: Thank you.

We will start with the Government's case.

MR. APPLEBY: Your Honor, I give my apologies. I just learned from Agent Rawald that Det.

EXCERPTS FROM TRIAL TRANSCRIPT - JAMES F. COPELAND



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MR. KLEIN: Yes, your Honor.

THE COURT: Bring in the jury.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

THE COURT: You may proceed, Mr. Appleby.

MR. APPLEBY: The Government calls as its first witness Det. James Copeland.

THE COURT: Come up, please.

J A M E S F. C O P E L A N D, sworn.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q Detective, would you state for the jury again by whom you are employed.

A I am employed by the New York City Police Department. I am a detective in rank and assigned to the New York Drug Enforcement Task Force.

Q How many years have you been so employed?

A I have been employed for thirteen years, seven months at this time.

Q And what are your duties with the Drug Enforcement Administration?

A I am an undercover investigator.

Q Can you explain briefly for the members of

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the jury how an undercover investigator operates.

A An undercover investigator is assigned to cases to go out and infiltrate and to try to purchase narcotics to effect the arrest of narcotics distributors.

Q And when you make these purchases you are -- you are assuming the role of a would be buyer. Is that correct?

A That is correct.

Q How many undercover purchases have you made in your experience?

A Approximately 200 or more.

Q Do you know one Harvey Rosenberg?

A Yes, sir.

Q How did you come to meet Harvey Rosenberg?

A I was introduced to Harvey Rosenberg on April the 17th at the New York Drug Enforcement Task Force office.

THE COURT: What years is that?

THE WITNESS: 1975.

THE COURT: Thank you.

Q And what was your relationship to Harvey Rosenberg beginning on April 17th?

A He was a cooperative person working with me to affect an introduction to a narcotics distributor so

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that I might attempt to make a purchase of narcotics and to cause a case to be formed.

Q Do you know what Harvey Rosenberg's status was with the Court?

A All I knew is that he had been arrested previously and was at the time involved in an open case.

Q Now, you mentioned you first met him on April 17th. This was at the Task Force Office?

A Yes, sir.

Q Would you tell us what occurred at the Task Force Office?

MR. KLEIN: Objection. This is a hearsay and not binding on the defendant and outside the presence of the defendant.

MR. APPLEBY: I am asking what happened, your Honor.

THE COURT: Well, I don't--it is not binding on the defendant and I will receive it subject to it being confirmed. And it's not prejudicial at this point and it's not binding to this defendant. I will receive it.

The objection is overruled.

MR. APPLEBY: Thank you, your Honor.

Q Continue, please.

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A I was introduced to Harvey Rosenberg and preparations were made for a--for Harvey and myself--

MR. [illegible]: I object. I must object if these preparations were oral, it's certainly hearsay.

THE COURT: Overruled.

I am going to permit this testimony.

Q Continue, please, Detective.

A Preparations were made for Harvey and myself to go to Brooklyn to meet one Joseph Setter.

A recording device, a Nagra was placed on Harvey Rosenberg's body and he was searched to see that he did not have any contraband or anything of the like on his person. And a story was discussed between Harvey and myself as to my background and what had taken place previously with Mr. Setter.

Q What did you say?

A I asked Harvey when he told Mr. Setter my name, to tell him my name was Moe.

I asked him had anything else taken place with reference to my identity.

MR. [illegible]: May I have a continuing objection so that I don't have to get up each time?

THE COURT: Yes, you have a continuing

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objection as to this.

MR. KLEIN: Yes.

THE COURT: Of course, I remind the jury this is not binding on the defendant since he was not present. But this was certain preparations which were made in connection with this proceeding and it will be connected.

MR. KLEIN: It may be connected.

THE COURT: I'm sorry, it may or may not be connected; I'm sorry.

The Government has the obligation of connecting it if they intend that their case be put in. But it may not be connected, that's true.

Q Continue, please.

A Mr. Rosenberg told me that he hadn't discussed much about me because Mr. Setter did not want to meet me in person, but that I would accompany him and he would purchase the first package and attempt to get Mr. Setter to meet me.

Q Now, you mentioned a Nigra.

A Yes, sir.

Q Would you briefly describe to the members of the jury what a Nigra is.

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A A Nigra is a small recording device enclosed in a metal casing. It's a reel to reel device which has a switch for on and off purposes.

Q Incidentally, could this have been a Kel a Kel recording?

MR. KLEIN: The witness stated it was a Nigra and I don't think the prosecution should lead or try to correct him.

THE COURT: It's a recording machine in any event.

MR. APPLEBY: It makes no difference what type it is.

Q It was a body transmitter?

A Yes.

MR. KLEIN: It does make a difference. Mr. Appleby said it didn't and I say it does.

THE COURT: Let the witness testify.

Whatever it was, it was on Mr. Rosenberg at the time and you tell us what it was.

THE WITNESS: Your Honor, may I correct myself only to the fact that it was not a Nigra, it was a Kel device and this particular device was on a belt, a pocket type belt with batteries and the electrical device is contained therein.

A-70a

Q And how does it operate in terms of a person being able to listen to it?

A It has an antenna on it and someone else maintains-- someone else maintains a radio transmitter type of device where as they can hear what is going on--

Q Simultaneously?

A Simultaneously with the person that is wearing the device.

Q All right.

Now, can you continue with that--did there come a time when you left your Joint Task Force?

A Yes, sir.

Q Who did you leave the Task Force Office with?

A I left with Harvey Rosenberg and Sgt. Ronald and other officers [illegible].

Q And where were you going?

A We proceeded to Brooklyn in the vicinity of Glenwood Road and East 55th Street.

Q What location is that?

A That's in the Flatbush Avenue of Brooklyn, Flatbush, Canarsie area.

Q And does that location have any relationship to the defendant?

A-71a

A Yes, sir. It's about a block away from the defendant, Joseph Setter's residence.

Q Continue, please.

A I parked the vehicle on Glenwood Road between 54th and 55th Street. And Harvey exited the vehicle and walked down Glenwood Road where he crossed the street and entered a house.

Q He got out of your vehicle?

A Yes, sir.

Q You remained in your vehicle?

A Yes, sir.

Q And you observed Mr. Rosenberg walk in?

A Yes, sir, I observed Mr. Rosenberg leave my vehicle and walk down Glenwood Road where he crossed the street and entered a home, private home, number 54-16 Glenwood Road.

He stayed in there a short time. Afterwards I observed him exit that residence and come back to the undercover vehicle.

When he entered the vehicle he had told me he had seen the package, he had talked to Joseph Setter and that he was ready to buy the package. He had told me Joseph Setter did not want to see me at that time, but did want to see me at a later date where we would have a

meet. A-72 a

I then gave him $4,800 in official funds.

He also took a black cloth raincoat of his and he put it across his arm. He took the money which was inside a brown paper bag and he left the vehicle.

He then proceeded back down Glenwood Road and reentered the residence, 54-16 Glenwood Road. He stayed in there a short time and I observed him again exit the building, come back across the street and walk down Glenwood Road and return to the vehicle.

When he entered the vehicle he gave me a brown paper bag. I took the paper bag and I looked into it and I saw a clear plastic bag with a quantity of white powder therein.

He told me that the package was good and that Joe Setter would meet me at a prearranged location--at a prearranged time at a prearranged location where we would talk about a personal meet and a purchase a further purchase of narcotics.

Q Now, Detective, approximately what time did this transaction take place?

A I am not sure of the time. I would like to see my report to refresh my recollection as to the time.

MR. APPLEBY: Would you please mark this

document--excuse me, I think a copy of it is already marked.

Q Detective, I am going to show you Government's Exhibit 3500-1 and I ask you if that refreshes your recollection as to the time that transaction took place?

(Handed to the witness.)

Q Does it refresh your recollection?

A Yes, sir.

Q Can you tell the members of the jury approximately what time this transaction took place?

A Approximately 5:05 P.M.

MR. APPLEBY: I would ask that this packet be marked as Government's 1 for identification.

THE CLERK: One glassine package and contents marked Government's Exhibit 1 for identification.

(So marked.)

MR. APPLEBY: I now hand Government's 1 for identification to Mr. Klein.

(Exhibit handed to Mr. Klein.)

Q Detective, I show you Government's 1 for identification and ask you whether you recognize it.

MR. APPLEBY: Now I want the record to

A-74

reflect that Government's 1 for identification is a clear cellophane bag which contains two items, a brown paper bag and a packet containing a white powder with a rubber band tied at the top and that all contained within this one packet.

Q Is that correct?

A Yes, sir.

Q Can you identify the whole contents of Government's 1 for identification?

A Yes, sir, I can.

Q What is it--how do you recognize it? What do you recognize it to be?

A This is an evidence bag containing a clear plastic bag with white powder, a brown paper bag with a rubber band around it and distinguishing marks thereon that were made by myself and other officers.

Q Well, in relation to this case what do you recognize it to be?

A This is the package that--that was purchased by Harvey Rosenberg on the 17th, April 17th, 1975, and given to me.

Q When you say the package, you're referring to the two items inside the cellophane package. Is that correct?

A-75

A Yes, sir.

Q And these are the two items Mr. Rosenberg handed to you?

A Yes, sir.

Q How do you know these two items, the brown paper bag and the white plastic bag containing the white powder, are those two items?

A The brown paper bag has my initials, JFC, with the [illegible] on it, and also the white paper bag has an identification seal label with my signature on [illegible] white [illegible].

Also, the plastic bag has the evidence sticker which goes on the outer part of this plastic bag with my signature and the date on it.

And also, another seal label on the seal part of the clear plastic bag with my signature on it also.

[illegible] is the label affixed to the top of this bag.

A After the night of 4-17-75, after returning to the Task Force Office with this--with the quantity of the clear plastic bag which was tested and weighed for weight and put into this outer clear plastic bag and seal.

Q [illegible] this testing?

A-76

A Police Officer Ryan, and I witnessed it.

Q What did they do?

A They--we have what we call a three in one test at the office. It's three bottles of various chemicals that a portion of the powder is put into a tray and portions of each of these bottles--of these fluids is put onto the tray into the powder and it results in certain coloring which determines that it is cocaine.

Q Now, after it was weighed--was it determined to be cocaine?

A Yes, sir.

Q After it was weighed and tested what was done with this packet?

A After it was weighed and tested it was signed or initialed by myself and the officer who was doing the processing and then it was put into this outer plastic bag where it was sealed and put into the Task Office safe for safeguarding.

MR. APPLEBY: Your Honor, I offer Government 1 for identification.

THE COURT: It's marked for identification, isn't it?

MR. APPLEBY: I offer it in evidence, your Honor.

A-77

MR. KLEIN: I object to that. We haven't established the chain.

THE COURT: Objection sustained.

MR. APPLEBY: I will connect it later, your Honor.

THE COURT: It hasn't been connected and there is no way that can be received at this time.

MR. APPLEBY: All right.

Now, Detective, I would like you to introduce--to direct your attention to April 24th of 1975.

Were you on duty on that day?

A Yes, sir, I were.

Q And were you also operating in an undercover capacity on that date?

A Yes, sir.

Q Can you tell us exactly where you were?

A I was working in the New York Drug Task Force office and at approximately 3:15 P.M. I left the office and proceeded to Brooklyn, to Flatbush Avenue and Winthrop Street, where I entered the Grotta D'Oro Restaurant.

Upon entering the restaurant I observed Harvey Rosenberg and the defendant Joseph Setter sitting at a table.

A-78

I approached--

Q One moment--continue, please, I'm sorry.

A I approached the table and was introduced to Joseph Setter by Harvey Rosenberg.

I then sat down at the table with the two and we ordered something to eat. And I engaged Mr. Setter in conversation relative to the purchasing of a quantity of cocaine.

Q Do you see the Joseph Setter that Mr. Rosenberg introduced to you on that day in the courtroom?

A Yes, sir, I do.

Q Can you point him out, please, to the members of the jury?

A He is the gentleman sitting at the table over there, in the brown suit, brown tie, beige shirt.

THE COURT: Indicating the defendant.

Q Would you continue, please, Detective.

A I asked Joseph Setter about purchasing large quantities of cocaine from him.

He told me he could do it, but he would first want to sell a small package.

There was a lot of general conversation also involved and Joseph Setter gave me a card with three telephone numbers on it. One telephone number he told

A-79

me was his home residence and the other telephone numbers he said was his job that he worked. He was a salesman in an automobile salesman shop--store.

MR. APPLEBY: I ask this package be marked as Government's 2 for identification.

THE CLERK: One glassine envelope and contents marked Government's Exhibit 2 for identification.

(So marked.)

MR. APPLEBY: I show it to defense counsel.

(Item referred to handed to Mr. Klein.)

Q Detective, I show you Government's 2 for identification and ask you whether you recognize the card which was contained within the packet?

(Handed to the witness.)

A Yes, sir.

Q What do you recognize it to be?

A It's a business card of the place where Harvey Rosenberg worked. And on the back of the card--on the front of the card it has Potter, P-o-t-t-e-r, Buick and Opal. And underneath Harvey Rosenberg, used car manager.

Q Is this the card that Mr. Setter gave to you?

A Yes, sir, the card was given to Mr. Setter by

A-80

Mr. Rosenberg. Mr. Setter wrote his telephone numbers on the card and gave it to me.

Q Let me see if I understand you.

Mr. Rosenberg gave the card to Mr. Setter?

A To the best of my recollection I believe Mr. Setter asked for something to write on. Mr. Rosenberg gave him the card and Mr. Setter wrote his telephone numbers on the card and gave it to me.

Q And there are three telephone numbers on the back of the card?

A Yes, sir.

Q And those were what?

A The first number was--

Q Not the numbers. What did they represent in terms of what Mr. Setter told you?

A He told me the first numbers were the home telephone numbers, and the second two numbers were the numbers on the job.

MR. APPLEBY: I offer Government's Exhibit 2 for identification in evidence.

THE COURT: All right.

Received in evidence on behalf of the Government.

Mark it in evidence.

A-81

THE CLERK: Government's Exhibit 2 for identification, previously marked for identificatio marked in evidence.

(So marked.)

MR. APPLEBY: Can I pass it to the jury?

THE COURT: You can show it to them. It's only the phone numbers on the back, and tell them what it has on the front.

MR. APPLEBY: It has Potter Buick and Opal, used car department. It has Harvey Rosenberg, used car manager.

Q Incidentally, there are some initials on the front of the card. Whose initials are those?

A Those are my initials.

Q Dated and what initials?

A Dated 4-24-75.

Q And that date represents the same date you received it from Mr. Setter?

A Yes, sir.

Q Incidentally, what time did this meeting take place in the restaurant?

A It was approximately 3:45 P.M.

Q Sometime in the afternoon?

A Sometime in the afternoon, yes.

A-82

Q Now, did there come a time when you all left?

A Yes, sir.

Q Can you explain--can you tell the members of the jury how that occurred?

A Joe Setter said he had to get back to his job because he stayed too long on his lunch hour as it was. And we agreed that I would purchase an eighth of a kilo of cocaine from him on the 28th, around 10:00 o'clock.

Q Is that P.M. or A.M.?

A P.M.

Joe Setter told me to call him earlier that day to let him know if I was going to come.

I told him I would.

And he told me when I come I could park my car on East 54th Street and come around the corner, knock on his door and he would come out again in the car and we would do the thing in the car.

I agreed and we all left out of the restaurant, myself, Joe Setter and Harvey Rosenberg. We had a short conversation, general conversation out in front. I shook hands with Mr. Setter and he got into a yellow Eldorado and left the area.

I then got into my own vehicle and I also left

the area.

Q Incidentally, did Mr. Setter tell you how much he would sell the eighth of a kilogram to you for?

A Yes, sir. He told me it would cost me $5,500.

Q The telephone numbers on Government Exhibit 2, did your investigation determine to what address those telephone numbers are listed?

A Yes, sir.

Q Can you tell the members of the jury?

A The first telephone number in which Mr. Setter told me was his residential number came back to Mr. Setter's home residence, 54-16 Glenwood Road.

The second two numbers came back to a used automobile dealer, Executive Motors, I believe the name was.

Q Could it have been Exclusive Motors?

A Exclusive Motors, I'm sorry.

Q Now, Agent, I would like to direct your attention to April 28th, 1975.

Were you on duty on that date?

A Yes, sir.

Q And were you again working in an undercover capacity?

A Yes, sir, I were.

A-84

Q I would like to direct your attention to approximately 9:30 P.M.

Where were you at that time?

A Approximately 9:30 P.M. I was leaving the Task Force Office.

Q Continue, please, with what occurred on that date.

A Well, prior to my leaving the Task Force Office I made a phone call to Joseph Setter and let him know that I was coming that night and I would be there around 10:00 o'clock.

Q Was that recorded, that telephone conversation?

A Yes, it was.

Q That call was recorded?

A Sir?

Q Are you sure that call was recorded?

A I'm not sure. I thought it was. Maybe it wasn't.

Q Detective, I show you 3500-5 and ask you if that refreshes your recollection as to whether that call was recorded.

(Handed to the witness.)

A No, sir, that call wasn't recorded.

A-85

Q Now, what occurred after you placed the telephone call to Mr. Setter?

A At approximately 9:30 that night I left the Task Force Office and proceeded to Brooklyn. I arrived in the vicinity of 54th Street and Glenwood Road at approximately 10:00 P.M. I parked my vehicle on 54th Street approximately fifty feet from Glenwood Road and I walked from 54-16 Glenwood Road.

When I rang the bell Joseph Setter opened the door, came to the door and was dressed in terrycloth bathrobe, yellow terrycloth bathrobe and slippers.

He told me to come in. I walked into the apartment, into the house. And he told me to wait in a kitchen which was to the right of me off of the foyer.

Q Did he tell you why you should do that?

A Yes, he told me he had somebody inside.

After walking into the kitchen he talked for a short time and he told me he would be right back.

I could hear a female's voice in the background in the outer room which looked to be the living room.

Mr. Setter went into the living room and he disappeared from my sight of view.

After a short time he returned with a clear

A-82

plastic bag containing an amount of white powder. He gave me the bag and asked me, did I want a scale. I told him I did.

He walked back over to the foyer area, back to the left side, and there was like an office space with a desk and what looked to be office type of material.

He came back with a scale, put the scale up on the kitchen cabinet and put the plastic bag on the scale.

The weight of the contents of the plastic bag were short. He told me he couldn't understand it and he apologized and that he would have to go back in to the living room area and get some more.

He tore off a piece of aluminum foil paper and walked to the rear of the house, into his living room type area.

After a short time he returned with the aluminum foil paper with a quantity of white powder on it. He took the powder and poured it into the plastic bag which was still on the scale. The weight was still short. He told me he had to go back and get some more.

He went back into the living room area and after a short time returned again with another quantity of white powder on the aluminum foil paper.

He also poured this into the plastic bag which

A-67

was still on the scale.

Q Did he explain why it was short?

A I was to get--I was to purchase an eighth of a key of cocaine, and it was short of that amount in the plastic bag.

After which the weight was satisfactory to both of us, he also gave me a clear plastic vial containing another portion of white powder. He told me that this white powder was the pure thing and the powder in the plastic bag had actually come from the powder that was in the clear plastic vial.

After which I gave Mr. Setter $5,500. He counted it and put it in the pocket of his terrycloth robe.

We had some short conversation after that and I then left the house, leaving Mr. Setter in the house.

Q Did he make any reference to his girlfriend during the conversation with him?

A Yes, sir. In his apology for the shortness of the package, he told me he couldn't understand, because he is always correct with his weight. And after he came out of the living room area the first time, he told me that his girlfriend must have messed with the package and he continuously must have apologized for the

A-88

shortness of the package.

MR. APPLEBY: I would ask that these two separate cellophane bags be marked as the Government's next exhibit.

THE CLERK: One glassine envelope and the contents marked Government's Exhibit 3 for identification.

(So marked.)

THE CLERK: One glassine envelope and contents marked Government's Exhibit 4 for identification.

(So marked.)

MR. APPLEBY: I will show Government 3 and 4 to Mr. Klein.

(Counsel confer with each other out of the hearing of the court reporter.)

Q Detective, I show you Government's Exhibit 3 for identification and ask you whether you recognize that item?

A Yes, sir.

Q What do you recognize it to be?

A I recognize this item to be the evidence envelope containing the--containing the clear plastic vial that also contained the clear plastic powder.

A-89

Q That's the vial Mr. Setter showed you?

A Yes. It was given to me on the 28th by Mr. Setter.

Q Detective, it is--

MR. APPLEBY: I want the record to be clear that the vial is contained in a plastic bag, your Honor.

THE COURT: Which is sealed.

MR. APPLEBY: Which is sealed.

Q Is the vial contained in Government's 3 for identification in the same condition now as it existed when you received it from Mr. Setter?

A No, sir. It has a seal label on it at this time which it didn't have at that time, of course.

Q And how do you know this is the vial that you received from Mr. Setter?

A Because I put my name on the vial after returning from the Task Force Office that night.

Q Does it have a date on it as well?

A Yes, sir; 4-28-75.

Q Now, other than the label that you affixed to the vial, is the vial in the same condition as when you received it from Mr. Setter?

A Yes.

A-90

Q Now, after you received the vial--

MR. APPLEBY: If your Honor please, I would like to go back to Government's 1 and 2.

Q Do you recall Government's 1 and 2 contained in the first plastic bag?

A Yes, sir.

Q Let me show you again. I neglected to ask you a few questions.

Detective, would you take a look at Government's 1 for identification again and tell us whether the two items contained in that package are in the same condition as when you received it from Mr. Rosenberg right now.

A No, sir.

Q Will you tell us what is different on those two items?

A Well, the bag containing the white powder was inside the brown paper bag.

Q And there are some initials and writing on it?

A Yes, sir. There are initials and a seal label which I signed my name and initials myself, that are on the plastic bag and it wasn't there when Mr. Rosenberg gave me the exhibit.

A-91

Q Other than that though, it's in the same condition?

A Yes, sir.

Q Detective, now I am going to show you Government's 4 for identification and ask you whether you recognize the contents of the cellophane bag.

(Handed to the witness.)

A Yes, sir.

Q What did you recognize the contents to be?

A This is an Exhibit--sealed exhibit evidence bag containing a plastic bag with white powder therein and a brown paper bag.

On the plastic bag with the white powder I have my initials, JFC. On the brown paper bag I have my initials, JFC and the date and also an evidence seal label with my name and my initials, JFC and James Copeland and the date.

Q When did you put the initials and the date on those items?

A After reporting to the Task Force Office on the night of the 28th.

Q Are these the--is this the paper bag and the clear plastic bag that you received from Mr. Setter

A-92

on the 28th?

A Yes, sir, it is.

Q Now, the cellophane bag is sealed with a red sticker at the top.

A Yes, sir.

Q And your name is on that?

A My initials, JEC, is on the top on the right hand corner and my name, James Copeland, is written on the top.

Q It's dated what?

A 4-28-1975.

Q When did you place that seal on Government's 4 for identification?

A On the night of April 28th, after returning to the Task Force Office.

Q What did you do with Government's 3 for identification and Government's 4 for identification when you returned to the office?

A I gave it to Detective Marrero.

Q Were tests performed on Government's 3 and 4?

A Yes, sir.

Q Did you observe those tests?

A Yes, I did.

A-93

Q What tests were performed?

A The same three and one test which I explained with reference to the other exhibit was put on the contents of this plastic bag. And it was also weighed and sealed by myself and Det. Marrero.

Q Was it placed in a safe?

A Yes, sir.

Q You observed that?

A Yes, sir.

Q This is Government's 3 and 4?

A Yes, sir.

MR. APPLEBY: One moment, if your Honor please.

THE COURT: Sure.

(Mr. Appleby confers with Sgt. Rawald out of the hearing of the court reporter.)

Q Detective, you have stated that Police Officer Marrero placed it in the safe. Is that correct?

A That's correct.

Q I show you Government's 3500-5 for identification and ask you if that refreshes your recollection as to who placed it in the safe.

MR. KLEIN: Your Honor, I respectfully object. He is impeaching his own witness. The man gave a definite answer and he didn't show

A-94

his recollection was exhausted and he is impeaching him now.

THE COURT: He can impeach his witness under the rules. He is doing it to refresh his recollection.

MR. APPLEBY: Are you sure it was Police Officer Marrero who placed it in the safe, Detective?

MR.KLEIN: I object to what the prosecution is doing. Everytime he gets a wrong answer he says, "Are you sure of that," and the witness gets the cue and he then says it's someone else.

THE COURT: If the witness needs his recollection refreshed, I will allow it.

MR. KLEIN: Your Honor, this man gave an answer. He didn't say his answer needed refreshing.

THE COURT: I would rather the testimony went in properly. If his recollection needs refreshing, the Court would permit it.

MR. KLEIN: I would respectfully submit it doesn't need refreshing; it needs correction.

THE COURT: You agree with that?

MR. KLEIN: If he has given an answer that

A-95

is not satisfactory--

Q Det. Copeland, would you tell the members of the jury who you recollect having placed Government's 2 and 3 in the safe?

MR. KLEIN: I object. Already asked and answered.

THE COURT: I will permit it.

Overruled.

I will permit it.

A Detective Sierra and Police Officer Golub.

THE COURT: Do you want to offer 3 and 4?

MR. APPLEBY: Yes, your Honor.

THE COURT: Well, offer it.

MR. APPLEBY: I offer Government's 3 and 4, your Honor.

MR. KLEIN: I object to it.

THE COURT: Overruled.

It has definitely been connected . This is what he got from Mr. Setter.

Received in evidence on behalf of the Government.

MR. KLEIN: May I have a voir dire on this, if your Honor please?

THE COURT: Yes, of course. Go right ahead,

A-56

right now, right now.

MR. KLEIN: I don't know how good it will do. You have already ruled.

THE COURT: It's a voir dire as to those specific items, 3 and 4.

VOIR DIRE EXAMINATION

BY MR. KLEIN:

Q When is the last time you saw this?

THE COURT: Saw what?

MR. KLEIN: 3 and 4.

A The last time I saw the evidence there?

Q When is the next time you saw it after you said you saw somebody put it in the safe?

A Yesterday.

Q And how long a period expired between the time, those two times?

A Approximately a year.

Q And do you know where that was during that period of a year, whether it was out of the safe at any time?

A I know it was taken from the safe the next day and delivered to the Task Force Office Laboratory at the Drug Administration Office.

Q Right.

A-97

And do you know where else it might have been in the interim during that year?

A No, sir.

Do you know how many people may have examined it or looked at it and touched it during that year?

A No, sir.

MR. KLEIN: I respectfully move my objection; haven't shown a continuous chain of custody.

MR. APPLEBY: A continuous chain of custody-- if Mr. Klein wants me to call in every witness who possessed that package up to the time it's produced in this courtroom, I will produce them.

THE COURT: That's what you may have to do. He wants a continuous chain of custody. I will permit that.

Thank you, Mr. Klein.

MR. KLEIN: Would your Honor reverse your ruling, your Honor?

THE COURT: At this time it won't be received and I will permit the Government to put in whatever custody is required and see at that time whether it can be admitted.

MR. KLEIN: Thank you very much, your Honor.

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DIRECT EXAMINATION (Continued)

BY MR. APPLEBY:

Q Detective, I now direct your attention to May 19th of 1975.

Were you on duty on that date?

A Yes, sir.

Q Did you have any contact with the defendant Setter at that time?

A I made a telephone call to Mr. Sutter.

Q Was this telephone call recorded?

A Yes, sir.

Q Where was the telephone call made from?

A From the New York Drug Enforcement Task Force Office.

Q Where did you make a telephone call to?

A To his--to Mr. Setter's place of employment.

Q You made a recording of that telephone call?

A Yes, sir.

Q You were in my office yesterday. Is that correct?

A Yes, sir.

Q Did you hear that recording?

A Yes, I did.

A-99

Q Was that recording a fair and accurate representation of the conversation you had with Mr. Setter on that date?

A Yes, sir.

Q Detective, you were in my office and you also read a transcript of that conversation. Is that correct?

A Yes, sir.

Q Was that transcript a fair and accurate representation of the telephone conversation you had with Mr. Setter on that day?

A Yes, sir.

MR. APPLEBY: I would ask that this cassette be marked the next Government's Exhibit for identification.

THE COURT: One cassette marked Government's Exhibit 5 for identification.

(So marked.)

MR. APPLEBY: May I also have this transcript marked as the Government's next Exhibit for identification?

THE CLERK: Four-page document marked Government's Exhibit 6 for identification.

(So marked.)

A-100

Q Now, Detective, I show you Government's 5 for identification, which is the cassette.

Do you recognize it?

A Yes, sir.

Q What do you recognize it to be?

A This is the cassette tape that I used when recording the telephone conversation between myself and the defendant Joseph Setter.

Q And how do you know that is the tape?

A I have my initials at the top of the tape with the date.

Q And is that the original recording?

A Yes, sir.

Q And you heard this recording played in my office. Is that correct?

A Yes, sir.

Q And you recognized your own voice obviously?

A Yes, sir.

Q And you recognized the defendant's voice from previous transactions with him?

A Yes, sir.

Q I show you Government's Exhibit 6 for identification.

Do you recognize that transcript?

A-101

A Yes, sir.

Q What do you recognize it to be?

A This is a transcript of the recording of the telephone call of myself and the defendant Joseph Setter.

MR. APPLEBY: Your Honor, I offer Government's 5 for identification in evidence.

THE COURT: Mr. Klein.

MR. KLEIN: 5 is the cassette?

MR. APPLEBY: 5 is the cassette.

MR. KLEIN: May I just inquire as to that for a moment, your Honor?

THE COURT: Sure.

VOIR DIRE EXAMINATION

BY MR. KLEIN:

Q Detective Copeland, other than the strip of paper on the tape, that's on this cassette, and the writing on it, and the writing on the other side and the initials, is there anyway you can tell that this is the tape, this is the cassette that was made of that telephone conversation on May 19th?

A No, sir. It's just the same as any other cassette other than that.

A-102

Q And, Mr. Copeland, which is the handwriting you're referring to?

A On the right corner here, JFC.

Q And this is your printing up here?

A Yes, it is.

Q And now we are referring to side one?

A Yes, sir.

Q And when was that made? When was that put on there?

A The recording was made on the 19th. The inscription was made on the 20th.

Q And how about looking at the other side. Is that in your handwriting?

A No, sir.

Q And that's side two, right?

A Yes, sir.

Q And do you know when that was put on?

A No, sir.

Q And do you know, do you recall now whether it was on there at the time you put your note on side one?

MR. APPLEBY: Can you tell me what notes you are referring to, Mr. Klein?

MR. KLEIN: I am referring to this one,

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Mr. Appleby.

Q Do you know my question, Det. Copeland?

A Would you repeat your question, please?

Q Surely.

All I want to know, at the time you put this inscription on side one, which states conversation between Det. J. Copeland and Joseph L. Setter in CT 75-0113 on 5-19-75, Exhibit D, and then you initialed it and put the date, 5-20-75?

A Yes.

Q At the time you wrote that and initialed it, was this notation on the other side, which says 5-19-75--I can't read all of it, but in the blue ink, was this notation on there at the time? Do you recall?

A No, I don't recall that.

MR. KLEIN: While I am here, may I inquire as to the transcript while I am here?

THE COURT: Yes, sure.

MR. KLEIN: Fine.

Q Did you make the transcript?

A No, sir.

Q Do you know who made the transcript?

A I believe Police Officer Golub made the transcript.

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Q Do you know how many copies--how many versions--if that was the first version or whether that was a corrected version?

A No, sir, I don't know.

Q Do you know who did the typing?

A No, sir.

Q Do you know whether the typist was corrected by Officer Golub or by anyone else?

A I don't know, sir.

Q Do you know where this was kept, where this cassette was kept after you made it?

A No, sir, I don't.

Q When was the last time you saw this cassette?

A On the day of the 20th.

Q And what did you do with it?

A I gave it to I believe Police Officer Golub, Sgt. Rawald.

Q And when was the last time after May 20th, 1975, when you saw this cassette?

A On yesterday.

Q Do you know who had custody or access to it during that period of time?

A I know the Task Force Office had access to it

A-105

prior to giving it to the District Attorney's office--
I'm sorry, the U.S. Attorney's office.

Q It wasn't sealed to your knowledge, was it?

A Not to my knowledge.

MR. KLEIN: I respectfully except to the introduction into evidence.

THE COURT: Det. Copeland--

THE WITNESS: Yes, sir.

THE COURT: You heard the cassette?

THE WITNESS: Yes, sir.

THE COURT: You saw the transcription?

THE WITNESS: Yes, sir.

THE COURT: Is what you heard in that transcript a true and accurate report of what you heard and what you said on the 19th?

THE WITNESS: Yes, sir.

THE COURT: Overruled. Received in evidence.

MR. APPLEBY: Your Honor, with your permission I would like to have--

THE COURT: I think it's time for lunch and I think we will go to lunch.

MR. APPLEBY: Very good.

THE COURT: We will adjourn for lunch and we will come back at 2:00.

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Please do not discuss the case among yourselves or anyone else.

The jury may leave for lunch.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: You may step down.

Thank you.

THE WITNESS: Thank you, your Honor.

THE COURT: 2:00 o'clock.

(Luncheon recess.)

AFTERNOON SESSION

(The following takes place out of the presence of the jury.)

MR. APPLEBY: Your Honor, may I just make a statement?

THE COURT: Yes.

MR. APPLEBY: It's really a pronouncement, if you might say.

THE COURT: Sure.

MR. APPLEBY: The Government does intend to call Mr. Rosenberg. I have been talking over this matter with my colleagues and we will place him on the stand.

THE COURT: So there will be no oness on Mr. Klein at all.

MR. APPLEBY: That's right.

THE COURT: No oness on you at all. I shouldn't have put one on you in the first place.

The Government will call him.

MR. APPLEBY: I have put a call through to Mr. Rosenberg and he will come down as soon as I can locate him.

THE COURT: All right.

MR. APPLEBY: We would like to have an out

A-108

of the jury mini hearing with respect to Mr. Rosenberg, so we can establish his position on the stand and you can instruct him.

MR. KLEIN: Isn't there a Federal Rule if the Government knows the witness will avail himself of the Fifth Amendment privilege, they cannot put him on the stand?

THE COURT: You show me the authority.

MR. KLEIN: I don't have it right here.

THE COURT: You bring the authority in.

MR. KLEIN: Yes, sir, I will do that.

MR. APPLEBY: May I make a suggestion with respect to Mr. Rosenberg?

Perhaps to avoid any complications, Mr. Klein, I can enter into a stipul ation if Mr. Rosenberg would be called as a witness he would refuse to answer any questions and, therefore, it wouldn't seem that Mr. Setter is scared of--Mr. Rosenberg is scared of testifying because he wouldn't want to--

MR. KLEIN: No.

THE COURT: He doesn't want to do it. Forget it.

Ready to proceed?

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MR. APPLEBY: Yes, your Honor.

THE COURT: Detective Copeland, you may sit back.

All right, bring in the jury.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

THE COURT: Mr. Appleby, those last two pieces of evidence that were to be marked, did the clerk actually mark those?

MR. APPLEBY: One moment, your Honor.

No, your Honor.

I would like to move Government's 5 for identification into evidence at this time.

THE COURT: And the transcript?

MR. APPLEBY: Yes. It's marked for identification.

THE COURT: Those should be marked.

The clerk is coming now and he will mark those when he comes in.

MR. KLEIN: Can your Honor instruct the jury that the transcript is not evidence, it's what the jury hears that's evidence?

THE COURT: Yes.

A-110

It's what the jury hears. The transcript is just to be used as a guide in following whatever is on the tape.

MR. KLEIN: Yes, exactly what they hear.

THE COURT: Yes, what they hear, definitely. The transcript is only a guide that is used to follow what is on the tape.

Mark those in evidence on behalf of the Government.

THE CLERK: Government's Exhibit #5 and 6 previously marked for identification received in evidence.

(So marked.)

MR. APPLEBY: With your permission, your Honor, I would like to play Government's Exhibit 5 in evidence and distribute Government's 6 in evidence to the members of the jury.

THE COURT: You may do that.

MR. APPLEBY: Thank you.

(Transcripts of the recording are passed among the jurors.)

MR. APPLEBY: Before I begin with the tape, I would like to review some of the testimony with the detective from this morning.

A-111

THE COURT: Surely.

J A M E S F. C O P E L A N D, previously sworn, resumes the stand and further testifies as follows:

DIRECT EXAMINATION (Continued)

BY MR. APPLEBY:

Q You stated you did make a call to Mr. Setter. Is that correct?

A Yes, sir, that's correct.

Q This is on May 19th?

A Yes, sir.

Q And you made this call to his place of business?

A Yes, sir.

Q Thank you.

(Whereupon the cassette recording referred to is played.)

Q Detective Copeland, do you have a transcript in front of you now?

A Yes, sir.

Q Of the May 19th call?

I would like to ask you some questions about the transcript and what you're referring to on the transcript and what the defendant is referring to.

A Yes, sir.

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MR. KLEIN: I object, your Honor. The conversation speaks for itself. This calls for an operation of mind.

THE COURT: The conversation speaks for itself. I will sustain the objection.

MR. APPLEBY: Your Honor, what the witness--he can explain what he himself meant by certain terms and phrases.

MR. KLEIN: That's calling for an operation of mind.

THE COURT: Well, I would think the transcript would speak for itself and I think it's full enough that the jury can by looking at it have their understanding as to what it might be. I think it speaks for itself.

Q Now, Det. Copeland, there is reference on the tape to a forthcoming meeting?

A Yes, sir.

Q And that meeting was to take place the following Wednesday. Is that correct?

A Yes, sir.

Q And that would have been what day?

A That would have been the 21st.

Q Did you meet the defendant on the 21st?

A-113

A Yes, sir, I did.

Q Where did that meeting take place?

A At the Grotta D'Oro Restaurant on Flatbush and Winthrop Street in Brooklyn.

Q Can you tell the members of the jury what occurred at that meeting?

A I arrived at the Grotta D'Oro Restaurant at about 1:00 P.M. on May the 21st. And as I entered into the restaurant I didn't see Joseph Setter there. I sat down and ordered something to eat and awaited Mr. Setter.

Approximately half an hour afterward Mr. Setter showed up, sat down at the table with me and we began to discuss the quality of the package I had purchased from him on the 28th.

I let him know that I thought the package was not of good quality. He said he could not understand it because it was what he said it would be.

We discussed purchasing another package, a larger package, if Mr. Setter can give me a better quality than the last one.

He told me the man that he got the last package from didn't have good stuff and he wanted to get someone else and I was to call him at a later date.

A-114

After which Mr. Setter left the restaurant with me and he got into a yellow Eldorado and left the area.

I also got into my auto and returned to the Task Force Office.

Q Did you have any communications with the defendant thereafter?

A No, sir.

MR. APPLEBY: Your Honor, I have no further questions.

THE COURT: Do you want to pick up the transcripts, if you don't mind?

MR. APPLEBY: Yes, your Honor.

(Transcripts heretofore passed among the jurors are collected by Mr. Appleby.)

THE COURT: You may cross-examine him, Mr. Klein.

CROSS-EXAMINATION

BY MR. KLEIN:

Q Det. Copeland, my name is Irwin Klein and I represent Joseph Setter.

A Yes, sir.

Q How long have you been on the police force?

A Thirteen years and five months.

Q How long have you been a narco?

A-115

A Six years.

Q How long have you been assigned to this particular unit?

A Since October of '75--'74, I'm sorry.

Q Less than two years?

A Yes, sir.

Q How many times have you testified in court?

A Hundreds of times .

Q And do you usually testify with sureness and certainty?

A Yes, sir.

Q And is it customary for a prosecutor to remind you you're giving an incorrect answer by saying, "Are you sure?"

A It has been done in the past.

Q Is that a prearranged cue or a code between you and a prosecutor when you give a wrong answer he says, "Are you sure," and then you give the direct opposite answer?

A No, sir.

Q That's just a coincidence today?

A Not a coincidence, but it's not a prearranged thing.

Q But I noticed each time the prosecutor said,

A-11

"Are you sure," you did change your answer, didn't you?

A I don't recall whether everytime he did that, but it did happen, I imagine.

Q And you testified as to what kind of recording device you placed on this informant, Harvey Rosenberg?

A Yes, sir.

Q You testified it was a Nigra, didn't you?

A I first testified that until I corrected myself, yes.

Q Now, do you know how big a Nigra is?

A Yes, sir.

Q How big is it?

A Measurements, I couldn't tell you the exact measurements, but it's so large, yet so wide.

Q But would you say about four by six or something like that, five by eight, maybe, inches?

A I'm not sure of the exact measurements, but somewhere in that--

Q Am I correct that a Nigra is a self-contained unit besides having the recording device in there, you also have the tapes, so it records right in the case itself?

A A Nigra, yes.

A-117

Q And when you finish, then you opened the case and take out the tape and you can play it in there, if you wish, you can also take it out and put a new tape in, is that right?

A Yes, sir.

Q And you don't have to have any backup unit sitting in a car tuning to any particular frequency or wave length?

A Not with a Nigra.

Q That's right.

And the other thing is called a Kel. Is that correct?

A Yes, sir.

Q How big is the Kel?

A There are several different types of Kels. The type I have used most times are a small device, so large, but it goes into a belt of batteries.

Q Wouldn't you say--I beg your pardon, belt of what?

A A belt that has pockets with batteries contained therein.

Q Isn't that belt for concealment purposes?

A Well, it's for concealment purposes and for the strength of the recording device because it gets

D-118

its energy through the battery system in the belt.

Q Det. Copeland, isn't it about the size of a Ronson Cigarette lighter?

A I would say the size of a cigarette pack, the device itself, yes.

Q How thick is it?

A There are various sizes, but I would say just about like a cigarette pack.

Q But there is a big difference in size between the Nigra and the Kel, isn't there?

A Yes, sir.

Q And the way of operation, the reason the Kel is smaller, is because it doesn't have the reels right in the mechanism there, but that it's being transmitted on a radio frequency and anybody who happens to be on that wave length in an automobile can pick it up, am I correct?

A Yes, sir.

Q And the reason the Nigra is smaller--the Kel is smaller, the reels are contained in the Nigra and the Kel is merely a transmitting unit? Would you say that?

A Yes, sir.

Q A big difference between the two, isn't there

A-119

A Yes, there is a big difference.

Q You said you made a mistake when you said you put a Nigra on him?

A Yes, sir.

Q And the prosecutor had to remind you it was a Kel. Is that right?

A He didn't remind me, but by him asking me, it gave me a second thought as to whether it was the Kel or the Nigra.

Q Do you have any independent recollection of these events that took place or is your recollection based on what--on the conversations with the prosecutor or other members of your group or what you have been handed to read or copies of your Grand Jury testimony, and so forth?

A Most of my testimony was of an independent knowledge within myself. I have discussed it with the District Attorney--the U.S. Attorney and also to other members of the case that worked on the case.

Q And did the District Attorney--the prosecutor show you copies of reports that you had made concerning this case? In other words, did you read your report recently?

A No, sir, I didn't.

A-120

Q Did you read your Grand Jury testimcny?

A Yes, I believe I did, on one occasion.

Q When was that--

A Several--several months ago I believe I met with Mr.--with the U.S. Attorney and I went over my Grand Jury minutes.

THE COURT: Mr. Klein, copies of all of these has been furnished to you and your client in that case. Isn't that right?

MR. KLEIN: Pursuant to law, your Honor.

THE COURT: Whether it's pursuant to law or they wanted to give it to you, all I am saying is that you have copies of all those things?

MR. KLEIN: Yes. I am entitled to receive them.

THE COURT: Continue, counselor, continue.

Q Now, have you worked with this Harvey on any other case?

A No, sir.

Q Do you know that this Harvey pleaded guilty--excuse me, was apprehended by your group for a violation of these very same narcotics laws?

A I know that he had been arrested. By whom I do not know.

A-121

Q Do you know he pleaded guilty in that case?

A Yes, sir.

Q Do you know that he made a deal with the Government to cooperate by setting people up and breaking cases in return for consideration?

MR. APPLEBY: I object to the word "set up."

THE COURT: Sustained.

Rephrase the question.

Q Do you know that he made a deal with the Government to cooperate in the return for leniency on his sentence?

A I know that he consented to cooperate, for what reasons and for what he is to receive from it, I didn't know.

Q Did you think he was patriotic when he cooperated with you in this case?

A I wouldn't know, sir.

Q Do you know whether the cooperation in this case was part of his bargain for receiving leniency?

A No, sir.

Q Do you know whether he was being paid to cooperate in this case?

A I do not know, sir.

Q Where did you meet him?

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A At the New York Drug Enforcement Task Force Office.

Q Who introduced you to him?

A Sgt. Rawald.

Q Was he in custody at that time?

A No, sir.

Q I mean there were no handcuffs but he was there and Sgt. Rawald was there?

A To the best of my belief he was there by prior arrangement, yes.

Q With Sgt. Rawald?

A He wasn't in custody.

Q No. Prior arrangement with who?

A With Sgt. Rawald.

Q To meet you?

A I don't know if that was the planned reason for him to be there, but that's what happened after he was there.

Q All I am trying to find out how you came to be there at the same time. Was it a prearranged point?

A Yes, I'm sure it was.

Q And you knew you were going to meet this fellow?

A-123

A Yes, I did.

Q And did you know that he had been working as an informant for the Government after his apprehension and arrest for about a year and a half or so?

A No, sir.

Q Or for any period of time?

A I only know he was working at that time. And how long and what he had done Ididn't know.

Q Did you know he was working for any period of time, regardless for how long, as an informant for the Government?

A I only know he was cooperating as an informant and that's all I know.

Q Now, you spoke about--when you testified before the Grand Jury did you tell the Grand Jury--you did testify before the Grand Jury, didn't you, on October 10th, 1975?

A Yes, sir.

Q And did you tell the Grand Jury anything at all about this Kel transmitter?

A I don't know, sir.

MR. KLEIN: Do you have a copy? Mine is marked up.

(Handed to Mr. Klein.)

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MR. KLEIN: Thanks.

Q I show you--it's not even marked for identification, is it?

MR. APPLEBY: It's 3500 material.

Q I show you a copy of your Grand Jury testimony and ask you to refer to that portion of it on Page 2 and 3 which refers--you see here it says, "Were you working in an undercover capacity on April 17th, 1975?

"ANSWER: Yes, I was.

"QUESTION: And approximately at 3:15 where were you?

"ANSWER: I was in the vicinity of Glenwood Road and East 55th Street in Brooklyn.

"QUESTION: Can you tell us where you were at that time?"

Then you come to your answer on the next page, Mr. Copeland.

Do you see anything there about the Kel transmitter at all?

A I wasn't asked anything about the Kel and I didn't answer anything about the Kel.

Q So, in other words, your Grand Jury

A-125

timony was silent as to Kel transmitter?

I wasn't asked that question.

Q That's right.

But I ask you again, is your Grand Jury timony silent as to any Kel transmitter?

Yes, sir.

Q And that was the time you previously tified there was a Kel transmitter used. Is that ht?

I beg your pardon?

Q You testified earlier this morning that Kel transmitter was used earlier on that occasion.

Yes, sir.

Q Now, you sat in the car you say while rvey the informant went into the house. Is that right?

Yes, sir.

Q And then Harvey came out once and went ck again, came out again the second time and got into he car and you drove away?

Yes, sir.

Q All right.

Did you go into the house that day?

No, sir.

Q Did you see Joseph Setter in the house at

A-126

that time?

A No, sir.

Q Do you know who was--of your own personal knowledge do you know who was in the house?

A No, sir.

Q What is the exact date of the first purchase, the purchase you have just testified to on that particular occasion where Harvey the detective--Harvey the informant went into the house and came out and you said you gave him money, he went back into the house and he came out with a brown paper bag? What is the date?

A That was April 17th, 1975.

Q And what time was that?

A That was approximately 5--sometime after 5:00 o'clock.

Q Sometime after 5:00?

A Yes.

Q Like what?

A I'm not sure. I would like to look at my report to reflect my record--

THE COURT: Show him a copy of his report.

MR. KLEIN: Mine is marked up.

THE COURT: All right.

A-127

Get it from the prosecution.

MR. KLEIN: I have my little notes in the margin.

THE COURT: That's all right, that's okay.

(Report referred to handed to the witness.)

A That was 5:05 P.M.

Q That's when he came back?

A Yes, the second time.

Q That's right.

And you took right off from there?

A Yes, sir.

Q How long had you been outside the house on that block up to that point?

A From about 4:30, I believe it was.

Q From about 4:30?

A Yes.

Q Would you please look at your report that you made--when did you make that report, sir?

A The day after--the day after that event took place on the 18th.

Q I direct your attention--I invite your attention to the first paragraph, is that right, April 17th, 3:15 youleft your headquarters office and proceeded to Brooklyn, right?

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A Yes, sir.

Q Approximately 4:30 you arrived and parked on Glenwood Road?

A Yes, sir.

Q How long was he in the house the first time?

A About twenty minutes.

Q Now, when you saw Exhibit 1 for identification--when you saw Exhibit 1 for identification you testified it wasn't in this condition, the contents were not in this condition.

A That's correct.

Q There was a brown paper bag and inside there was a glassine bag with a white powder.

A Yes, sir.

Q You didn't actually see Harvey Rosenberg make the purchase or a purchase from Joseph Setter or anyone else in the house while you were outside sitting in the car, did you?

A No, sir.

Q All you know is what Harvey told you. Is that correct?

A That's correct.

Q You mentioned something about a three in one test. What is the three in one test?

A-125

A It's when we have three bottles of chemicals, sulfuric acid, I'm not sure of the third chemical, in which a portion of the white powder is taken out of the bag and put on a tray and through a series of steps these three chemicals are mixed with the contents, the powder content. When it results in a certain coloring effect we then assumed that it's a positive reaction and that cocaine does exist in the powder content.

Q That's an assumption?

A That's an assumption on our part, yes.

Q And did you administer the test in this case?

A No, sir. The other officers administered the test in this case.

Q Who? Who was that?

A Police Officer Ryan, Police Officer Golub, Detective Sierra.

Q Do you know if any of them are botanists?

A What is that?

Q Botanists.

A Partners?

Q Botanists, B-o-t-a-n-i-s-t-s.

A No, sir.

Q Botany, plants.

A-136

A No, sir.

THE COURT: He probably doesn't know what that is.

MR. KLEIN: I beg your pardon, sir.

THE COURT: It doesn't appear he knows what it is.

Q I am talking about somebody who is an expert or specialist on plants. That's what botany is.

A I don't think so.

Q Do you know if they are chemists?

A To my knowledge they are not chemists.

Q Do you know if they are physicists?

A To my knowledge they are not.

Q You testified that it was cocaine?

A Based on our tests and the laboratory analysis report afterward, yes.

Q When did you first make a determination or come to the conclusion that it was cocaine?

A After we received the analysis I was sure it was cocaine. But from the tests that were put on the white powder contents I suppose that it was cocaine, yes.

Q And that field test was made that night?

A Yes, sir.

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Q Or the same day?

A Sir?

Q The field test was made the same day as the seizure, as the purchase?

A Yes, sir.

Q And when was the laboratory test made, do you know?

A I don't know when it was made.

Q Now, what happened to the samples that were used for the testing--excuse me, withdrawn.

They didn't test--

MR. APPLEBY: What test are you referring to, Mr. Klein?

MR. KLEIN: The field test he had so given.

Q This is the bag that you say that Harvey handed you on that first day, is that right, this Exhibit 1 for identification?

A Yes, sir.

Q And you say you saw a field test made from a portion of this, right?

A Yes, sir.

Q Now, was the remaining contents of the powder in this item, was this tested or was a sample tested?

A-132

A A small portion of the powder in the bag was taken out of the bag and placed in a tester, yes.

Q So no test was made of this in the glassine bag, a test was made of a sample, of a portion taken from here. Is that right?

A Yes, sir.

Q And what happened to the remainder of this sample or was it all used up?

A It was just a pinch and actually it was used up.

Q And what happened to those samples that were used in the tests, do you know?

A I don't follow you, sir. Would you repeat?

Q What happened to it after they gave it this three in one test?

A You mean what happened to the result of the test?

Q No, not the result of the test. What happened to the pinch, the sample to which the tests are supplied?

A It's diluted and in the chemical that's in the test.

Q Was that then destroyed?

A It's discarded afterward, yes.

Q So we have no documentary proof or evidence of that test. Is that right?

A-133

A No other but testimony which we--the decision which we came to and stated in our report.

Q Right.

Other than that we haven't got the physical item itself?

A No, sir.

Q Do you know whether cocaine is an alkaloid or not?

MR. APPLEBY: Your Honor, maybe Mr. Klein can reserve his questions for the chemist.

THE COURT: I think you properly should because this man is not an expert and you're taking it right out of a book.

MR. KLEIN: That's correct.

THE COURT: So when the chemist comes, the chemist may be able to resolve all of these problems for you possibly. I don't know.

MR. KLEIN: Not only the chemist, but whoever administers the field test. I would like to examine on that. Because they made a determination right on the spot and the witness testified about a three in one test.

THE COURT: It was only a pinch anyway. I don't think it's going to be dispositive of

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what is before the Court at this point.

As to a pinch, I don't think it will create any big problems because a chemist is going to have to testify as to what is in that bag.

MR. KLEIN: Yes. But the Government put this man on the stand to elicit testimony that it was cocaine.

THE COURT: He told you what happened to the pinch.

MR. KLEIN: I am not discussing the pinch at this point.

THE COURT: Go ahead with the witness.

MR. KLEIN: I am trying to defend the liberty of the client here.

THE COURT: Mr. Klein, you go right ahead and ask this witness anything you wish. This witness is not a chemist. That's Mr. Appleby's point.

MR. KLEIN: I have established that. Good enough.

Q Now, when was the purchase you say you made, the direct purchase from Mr. Setter? What was the date of that?

A On April 28th, 1975.

A-135

Q April 28th.

What time?

A Approximately 10:35, 10:25.

Q At night?

A Yes, sir.

Q Do you know--and this was in the house, he had company in the house?

A Yes, sir.

Q You said he had company?

A Yes, sir.

Q Do you know if he had another man in there named--

MR. APPLEBY: I believe he stated he didn't know who was in the house, Mr. Klein. That was his testimony.

Q Did you say you didn't know who was in the house?

A I said he had company in the house.

Q Do you know after you left the premises, was there a male seen leaving the premises other than Mr. Setter?

A No, sir.

Q You don't know that or that's not so?

A-136

A I don't know that.

Q What date did you meet Mr. Setter in the Rizuto (phonetic spelling)?

A What is that, sir?

Q What day did you meet him in the Italian Restaurant? Grotta Rizuto, wasn't it?

A Grotta D'Oro.

That was April 24th, 1975.

Q And what time is that?

A That was about 3:15--yes, about 3:15 in the afternoon, I think.

Q I invite your attention to--do you still have your Grand Jury testimony? I think you do.

Page 4 to the Grand Jury testimony, Line 9--Line 6.

Were you asked this question, did you make this answer?

"QUESTION: Now, Detective--"

By the way, you're being questioned, I believe, by Mr. Appleby, the Assistant U.S. Attorney?

A Yes, sir.

Q All right.

"QUESTION: Now, Detective, I would like to refer you to April 25, 1975, and

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I would ask you where you were and what you were doing on that date.

"ANSWER: On that date--on that date, the 25th of April, 1975, I was in the vicinit of Flatbush Avenue and Winthrop Street where I entered the Grotta D'Oro. There I met Joseph Setter and the confidential informant."

Do you recall being asked that question and giving that answer?

A Yes, sir.

Q Does that refresh your recollection as to the date that you met Mr. Setter in that restaurant?

A That question was asked from a typographical error on the report and answered reflecting the same error.

Q When did you discover the typographical error?

A The day of the Grand Jury hearing, afterwards.

Q And was any correction made?

A Yes, it was brought to the attention of Mr. Appleby who made the correction in his own personal notes.

MR. KLEIN: Mr. Appleby, do you have any written correction in front of the Grand Jury on this question and answer?

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MR. KLEIN: I don't believe the Detective was referring to the Grand Jury.

Were you referring to the Grand Jury, Det. Copeland?

THE WITNESS: No, I brought it to your attention the date of the Grand Jury hearing.

MR. KLEIN: Is there any correction in the Grand Jury minutes? That's all my question referred to.

MR. APPLEBY: No.

Q Are you referring to your report--do you have your report here, sir?

A Not for that date.

(Both counsel confer with each other out of the hearing of the court reporter.)

Q Second paragraph, Mr. Copeland.

Mr. Copeland, I show you this paper and what is that? Is that a report you make concerning your activities?

A Yes, sir.

Q And is that done in the normal course of business at or about the time of the event reflected in the paper?

A Usually not long after the event.

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Q Right.

And up in the upper left, in the box there says, buy, a..t and the date. It says Det. James Copeland, New York, N.Y., 4-24-75.

Yes, sir.

Q And then in paragraph two does it not tend the following statement: On April 25th, 1975, approximately 2:40 P.M.--and it goes on to say entered the restaurant, Grotta D'Oro, and met ? Is that right?

Yes, sir.

Q And you say that date is wrong?

Yes, sir. The report was prepared on the 25th, h reference to the events of the 24th.

Q How long after this report did you testify ore the Grand Jury? Do you know how long after?

That report was made April 24th. Is that ht?

It was made out on April 25th.

Q It was made out on April 25th.

And you testified before the Grand Jury October 10th, 1975. Is that right?

Yes, sir.

Q And April 25th appears there also. Is

A-140

that right?

A Yes sir.

Q And that was your oral answer, your verbal answer at that time?

A Yes, sir.

Q Did Harvey ever tell you that Mr. Setter didn't want to meet with you or deal with you or have anything to do with you?

A Yes, sir.

Q Did he tell you that on any number of occasions or just once?

A No, he just told me that prior to the 17th.

Q And did you urge him to go ahead anyhow and to set up a meeting and try to get Mr. Setter to sell to you?

A No, I personally didn't.

Q I beg your pardon?

A I personally did not urge him to do so.

Q Did somebody else urge him to do that?

A I wouldn't know.

Q When he said that--when you say that Mr. Harvey Rosenberg said Mr. Setter didn't want to deal with you or have anything to do with you, did you tell him forget it?

A-141

A No, because he just said Mr. Setter didn't want to meet me.

Q You didn't tell him to drop it, did you?

A No, sir.

Q Did you tell him to go ahead with it?

A He had already been told to go ahead with it.

Q By somebody in your group?

A By the superiors and the officers working with him, yes.

Q So, in other words, what I am trying to find out here, even though your confidential informant told you that he had made contact with Mr. Setter and that Mr. Setter did not want to meet you, they nevertheless instructed him or directed him and told him to continue his efforts to set up a meeting with you. Is that right?

A Yes, sir.

Q You made a statement that when you were in the house buying directly from Mr. Setter, that he had other company in the other portion of the house.

A He said he had company.

Q Did you hear voices?

A I heard a voice of a female.

Q And when you weighed this product, whatever

A-192

it was, did you say it was not full weight?

A Yes, sir.

Q And you say Mr. Setter then told you he didn't understand it, my girlfriend must have messed with the package?

A Yes, sir.

Q Did you say that when you went to the Grand Jury?

A I don't recall, sir.

Q Why don't you take a look and see if you did.

A Which page, Counselor.

Q It should start at the bottom of Page 5 and go into Page 6 and 7.

(Whereupon there was a pause.)

Q All right.

Now, did you make that statement to the Grand Jury that Mr. Setter said my girlfriend must have messed with the package?

A No, sir, I did not.

Q And did you make a report of the incident, one of your regular reports, a DEA-6?

A I believe I did, yes.

MR. KLEIN: I don't know if this is marked

A-143

in evidence.

Q Do you want to look at that and see if it is in any way in there? This is a report made by you.

A Yes, sir.

Q What date is that, Mr. Copeland?

A April 29th.

MR. APPLEBY: What 3500 number?

Q What is the number up there in the right in ink?

A 3500-5.

Q If you go through it you will see on the second page, I believe, do you see the word there, my girlfriend must have messed with the package, anywhere on that paper?

A Yes, sir.

Q Where is it?

A In Paragraph 4.

Q What does it say?

A Det. Copeland examined the white powder and Setter added the powder to the other white powder in the clear plastic bag. Setter blamed the shortage on his girlfriend and promised Det. Copeland it would not happen again.

Q When you went to the Grand Jury you didn't

A-144

say it, did you?

A No, sir.

Q And in Paragraph--the top paragraph on that page, up here on Page 2, I think it's Paragraph 3--is there a statement as to the shortage in that paragraph?

A Yes, sir.

Q And would you read that statement?

A Setter took the plastic bags containing the white powder and put it on the scale. Det. Copeland noticed the weight of the plastic bag was right. Setter said he could not understand it because he had weighed the package himself earlier in the day.

Q There is no mention about a girlfriend messing with it there, is there?

A Well, the next continuing passage--

Q Right, but when you went to the Grand Jury you didn't say anything about it, did you?

A No, sir.

Q Now, what kind of scale was this? Can you describe the scale?

A Like a tri-bar scale, about so long, sixteen inches long or so. It has a bar that goes across the, the weight--I don't know how to word it, but it has a round--like a dish shaped top to it that you put the

A-145

package on as your scale goes down you set it to the amount that you want.

Q Right.

Now tell me, when Harvey went in to see Mr. Setter and--

THE COURT: This is on the first occasion?

MR. KLEIN: On the first occasion, yes.

THE COURT: This is not the occasion when he was there?

MR. KLEIN: No. Harvey wasn't there on the second one.

Q Harvey was only there on one occasion, the first time?

A Just the first time.

Q That's what I'm speaking of. I don't want to confuse you.

A He was at the negotiation meet here.

Q The two instances we are talking about, the two sales here--

A Purchases.

Q Yes, purchases.

When Harvey went in he was wired with this Kel transmitter, is that right?

A Yes, sir.

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Q And there were agents in the car or on the street who were tuned in?

A Yes, there were agents on the street.

Q And they were listening to it?

A Yes, sir.

Q And they had recording devices in the trunks of their car?

A Yes, sir.

Q And did Harvey wear this flamboyantly like my tie, out openly, or did he surreptitiously conceal it in his clothes somewhere?

A It was concealed in his clothes.

Q And wasn't Setter aware of the fact that Harvey had engaged him in a conversation--was engaging him in a conversation and leading him in a conversation that was being taped?

A I don't know, but I am sure he was not aware of it.

Q Wasn't the purpose--withdrawn.

Was Harvey briefed before he went out to permanently record Mr. Setter's testimony on that tape? Was he briefed as to the nature or types of questions he should ask?

A No, sir.

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Q He just put a tape--you put a tape recorder on a man and send him out and they could have been talking about a baseball game or basketball game?

A He was told what he was to go to purchase or attempt to purchase.

Q Wasn't he told to go out and set him up and elicit incriminating testimony, evidence against Harvey--against Mr. Setter?

MR. APPLEBY: Your Honor, I will object.

THE COURT: Sustained.

Rephrase the question.

MR. APPLEBY: Your Honor, also I would ask that you instruct the jury that a question is not necessarily evidence.

THE COURT: Yes.

A question is not evidence. That's the attorney's statement.

Q Was this the first time to your knowledge, your personal knowledge--excuse me, this is the very same day that you met Harvey?

A Yes, sir.

Q And you're putting on a recorder that day, right?

A Yes, sir.

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Q So as far as you were concerned, of your own personal knowledge this was the first time that Harvey goes to talk to Mr. Setter from your own personal knowledge?

MR. APPLEBY: I am going to ask that Mr. Klein clarify what he means by his own personal knowledge.

THE COURT: He means his own personal knowledge.

To your personal knowledge.

THE WITNESS: To my own personal knowledge, other than what I was told, that's the only time I saw him go to Mr. Setter's house.

Q Didn't he go there, didn't he consent or didn't he put on that Kel transmitter and engage Harvey--engage Mr. Setter in a conversation that Mr. Setter didn't know was being taped, solely for the purpose of setting up Mr. Setter and breaking a case as part of his agreement with the Government so he can get leniency for his own crime?

A No, sir.

MR. APPLEBY: Again I object to the word, "set up."

THE COURT: Well, he said no. I will

A-149

permit it.

Q You said no, sir?

A Yes, sir.

Q We come to the telephone conversation that was made, that you made, that was taped. Is that right?

A Yes, sir.

Q You called Mr. Setter from your office, the one we heard a little while ago?

A Yes.

Q Did someone tell you to make the telephone call?

A Mr. Setter told me to make the telephone call.

Q Did somebody tell you to tape it?

A Yes, sir.

Q Did Mr. Setter tell you to tape it?

A No, sir.

Q Did Mr. Setter know he was being taped, at the time?

A No, sir.

Q Did you tell him he was being taped at the time?

A No, sir.

Q Did you conceal from him the fact that he

A-150

was being taped at the time?

A Yes, sir.

Q You consider it an invasion of privacy to tape a conversation you're having with somebody?

MR. APPLEBY: I object to that, your Honor.

THE COURT: Sustained.

Don't answer the question.

Q You're a law enforcement officer, Mr. Copeland, and weren't you trying to get the goods on Mr. Setter in that conversation?

MR. APPLEBY: Objection.

THE COURT: Sustained.

Don't answer the question.

Q Weren't you attempting to obtain evidence that Mr. Setter was engaged in possession of and sale of cocaine when you made that--when you taped that telephone conversation?

A I was confirming the fact that I had a narcotics discussion with Mr. Setter on the telephone.

Q I am asking you the reason that you taped it. You could have had a telephone conversation with him without it being taped. I am sure there are thousands of calls made like it a day.

I am talking about the reason you put it

A-150 a

on tape. Wasn't it for the purpose of getting evidence, incriminating evidence against Mr. Setter?

A For additional evidence, yes.

Q So your answer to my question is yes then?

A Yes, sir.

Q Are those tinted glasses that you wear, Mr. Copeland?

A Yes, sir.

Q Is that because of a color blindness?

A No, sir.

THE WITNESS: May I ask your Honor, should I take my glasses off?

THE COURT: You don't have to. You can keep them on, if you wish. It's up to you.

MR. KLEIN: Let me explain, if I may.

THE COURT: You don't have to explain. You can use it in summation.

MR. KLEIN: I don't have to use it in summation. When the other people I get on the stand--when you referred to a color test--

THE COURT: You don't have to explain, you don't have to explain.

MR. KLEIN: All right, sir.

Q Now, you testified, I believe, that during

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this conversation at the Grotta D'Oro, Grotta D'Oro, I think is, you were making arrangements for a purchase on the 28th of April?

A Yes, sir.

Q And the arrangements were with respect to a particular car. What were the arrangements, whose car was it supposed to take place in?

A In my own automobile.

Q In whose?

A My car.

Q Your car?

A Yes, sir.

Q I show you Page 4--Page 4 of your Grand Jury testimony next to the last paragraph, line 22, starting on Line 19.

"He told me when I came to his house,"--

Do you follow me--

"to park on 55th Street or 54th, to knock on his door, he would come out of his house, he would walk around the corner and we do the package in his car."

A No, sir, that's an error.

Q In other words, your testimony was wrong in the Grand Jury then?

A-15

I said my car or the car. I knew it wasn't his car.

Q So the reporter made the error and put his instead of mine?

I don't know who made the error, sir.

MR. KLEIN: Please bear with me.

THE COURT: Take your time, take your time.

Maybe we will take a short adjournment.

While the jury's out, please do not discuss the case. The jury may go out for a short adjournment.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: Mr. Copeland, when you get off at this point, don't discuss the testimony.

(A recess is taken.)

(The following takes place out of the presence of the jury.)

THE COURT: Det. Copeland, come up.

THE WITNESS: Yes, sir.

THE COURT: Ready to go?

MR. KLEIN: Yes.

(The jury enters the courtroom and the

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following takes place in open court and in the presence of the jury.)

THE COURT: Ladies and gentlemen, while you were out I had to take care of some court business and that was why it was so long in your returning to the court.

Mr. Klein, you may continue.

BY MR. KLEIN:

Q Detective Copeland, during the intermission did you discuss this case with anybody from the prosecutor's table?

A No, sir.

Q I believe you testified that you arranged to set up this meeting at the Grotta D'Oro on May 21st or for May 21st?

A Which meeting are you referring to?

Q How many meetings were there at the Grotta D'Oro?

A There was two.

Q I see, there were two.

I refer to your Grand Jury minutes, Page 4, Line 6.

I just read it to you and it was in reference to April 25th, and you see there you were

A-154

asked where you were and what you were doing on that day and you answered on Line 9 stating you were at the Grotta D'Oro Restaurant and you met Joseph Setter and the confidential informant Harvey.

A Yes, sir.

Q That's April 25th and you said it should have been April 24th?

A Yes, sir.

Q Anything about May 21st on there?

A No, sir.

Q Is there anything in your Grand Jury testimony about May 21st about which you just testified, setting up another meeting there?

A No, sir.

Q Did you make a daily report for May 21st?

A Yes, I did.

Q You did?

MR. KLEIN: Can I have the report for May 21st?

MR. APPLEBY: I turned over all 3500 material to you, Mr. Klein.

I'm sorry, your Honor, the entire case report was turned over to Mr. Klein. Sgt. Rawald informed me there is such a thing called

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daily reports that the U.S. Attorney's office does not get. If Mr. Klein would like me to have Sgt. Rawald get that, I would get it for you.

MR. KLEIN: All I am saying is certain papers were turned over to me.

THE COURT: They should have turned everything over to you.

MR. KLEIN: Yes, your Honor.

MR. APPLEBY: In the normal course of business they are not turned over, but we will get it to Mr. Klein.

THE COURT: Get it for him and see that he is furnished copies.

MR. KLEIN: Can we hold Agent Copeland for further cross-examination until I get the further papers, then?

MR. APPLEBY: Sgt. Rawald would like to ask a question, your Honor.

SGT. RAWALD: Through you, your Honor, is Mr. Klein going to ask for all the days or for all the witnesses involved?

THE COURT: I imagine so, I imagine so.

MR. KLEIN: Yes.

Q Your testimony--excuse me, please describe

A-156

how Mr. Setter looked on the day you say you made the purchase from him?

A On the night of April the 28th, is that the date you're referring to?

Q Right.

A He was dressed in a yellow tight clinging terry-cloth robe and he had slippers on. He had shorts under that and I don't recall the--

Q I am not talking about the clothes. I am talking about how he looked.

A Pretty much the same as he does today, with the exception that his hair was a little longer.

Q His hair is a little longer today?

A No, his hair was a little longer then.

Q How about the mustache?

A I don't think it was as heavy as it is today.

Q Anything else you want to tell us about how he looked on that day?

A He had a goatee.

Q He had a goatee?

A Yes, a small goatee.

Q And this was April 28th?

A Yes, sir.

Q Did he have a goatee everytime you saw him?

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A I believe so, yes.

Q How many times did you see him?

A Only twice--three times, actually; the 17th, April 24th and April the--I'm sorry, may I correct myself?

THE COURT: Just tell us correctly.

A On the 24th, the 28th and on May the 21st.

Q You didn't see him on the 17th?

A No, sir, I did not.

Q Did you ever see him on the 24th?

A On the 24th I saw him at the Grotta D'Oro Restaurant.

Q On the 28th you did see him at his house?

A Yes, sir.

Q And on May 21st?

A Yes, sir, I saw him again.

Q Where did you see him?

A At the Grotta D'Ora Restaurant.

Q And you say he had a goatee each and every one of those times?

A To the best of my recollection he had a small goatee.

Q Who arranged the meeting at the Grotta D'Oro Restaurant?

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A Which meeting, sir?

Q The first meeting.

A That was prearranged by Mr. Harvey Rosenberg.

Q Harvey Rosenberg the informant?

A Yes, sir.

Q All right.

And after that meeting you say you made a purchase on April 28th. Is that right? That was four days after the meeting?

A Yes, sir.

Q And would you say that the purchase which you claim you made from Mr. Setter came about largely due to the efforts of the informant Harvey Rosenberg inducing Mr. Setter to meet with you?

MR. APPLEBY: Objection. Calls for a conclusion.

THE COURT: Sustained.

Rephrase.

Q Would you say that the purchase which you claim you made from Mr. Setter on April 28th came about in great measure due to the efforts on the part of Harvey Rosenberg, the informant--

MR. APPLEBY: Objection.

Q --who arranged to introduce you to Mr.

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Setter and arranged a meeting between you and Mr. Setter?

MR. APPLEBY: Objection, your Honor.

THE COURT: Sustained.

Q If you hadn't met Mr. Setter then you couldn't have purchased any cocaine from him, could you?

MR. APPLEBY: Your Honor, that's argumentative.

THE COURT: Sustained.

Q Who arranged the meeting at the Grotta D'Oro Restaurant?

A Which meeting are you referring to?

Q The first meeting that preceded April 28th, which is April 24th or 25th.

A To my knowledge it was Mr. Setter and Mr. Rosenberg's arrangements. I don't know who stated as to what time, where or whatnot, but it was arranged by the two.

Q Who told you that there was a meeting?

A The officers who handled the case and Mr. Rosenberg.

Q Well, prior to this time Harvey had informed you, had he not, that Mr. Setter didn't want to meet you?

A Prior to Harvey's going to Mr. Setter's

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residence, he told me that, yes. But after that he told me that he would meet me at another time.

Q And you're saying that Harvey had spoken to Mr. Setter before he went to his residence on April 17th?

A Yes, sir.

Q And Harvey had told you that Mr. Setter didn't want to meet with you?

A Yes, sir.

Q Did you ask Harvey to arrange a meeting with you, with Mr. Setter?

A I might have, sir.

Q And finally, Harvey did arrange a meeting. Apparently he was successful. Is that right?

A Yes, sir.

Q Then would you say that the purchase or the sale--excuse me, would you say that Harvey's efforts in your behalf in introducing or convincing Mr. Setter to meet you and deal with you contributed to the success and completion of the purchase and sale on April 28th?

MR. APPLEBY: Objection, your Honor.

THE COURT: Sustained.

Don't answer the question.

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Q Did Harvey ever tell you how many times and what efforts he made to get Mr. Setter to agree to meet with you?

A No, sir.

Q You say that the first time you met Harvey you had not met Mr. Setter, had you?

A No, sir.

Q And the first time you met Harvey, the same day you put a Kel transmitter on his belly, his waistband, is that correct?

A I didn't put the transmitter on him.

Q You saw him get dressed with it?

A Yes, sir.

Q And what about his belly--right around the belly. Is that right?

A Yes, sir.

Q Were all your conversations thereafter with Mr. Setter taped?

A No, sir.

Q Were all Harvey's--to your knowledge were all Harvey's conversations with Mr. Setter before and after that day taped?

A Not to my knowledge.

Q Are there any tapes that were made of

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conversations with Mr. Setter, either with you or Mr. Setter or with Harvey and Mr. Setter that have not been produced in this courtroom?

A Not to my knowledge.

MR. APPLEBY: Wait, I would like a clarification, produced in this courtroom. Are you talking about prior to this trial?

MR. KLEIN: Why don't we clarify it then.

Q Mr. Appleby has suggested not only this tape, but I understand there are two more tapes--

MR. APPLEBY: Yes, that's correct.

Q I am talking about the three tapes.

MR. KLEIN: Thank you, Mr. Appleby.

Q Only one has been put in evidence so far. I am talking about the three.

Are you familiar with the three tapes I am talking about?

A Yes, sir.

Q They were two others besides this one that Mr. Appleby had.

I am asking, were there occasions when Mr. Setter's conversations with you or with Harvey, either by telephone or in person were taped and we don't have the tapes here?

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A The defendant--

THE COURT: Mr. Appleby, perhaps you can answer that.

MR. APPLEBY: I don't think Det. Copeland knows what I have in my possessinn.

THE COURT: Ask him if he has produced them.

MR. APPLEBY: I will just state that all the tape recordings made in this case have been turned over to you prior to trial.

Q Then I will ask you this: Were you taped everytime you spoke to Mr. Setter?

A No, sir.

Q Who decided when to tape the conversation and when not to tape the conversation?

A I think that decision was made by Sgt. Rawald.

Q Was that decision made before you entered into the conversation with him or after?

A Before.

MR. KLEIN: I have no further questions, your Honor.

THE COURT: Any redirect, Mr. Appleby?

MR. APPLEBY: Just a few, your Honor.

THE COURT: All right.

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You may proceed.

REDIRECT EXAMINATION

BY MR. APPLEBY:

Q Det. Copeland, there has been reference to the April 24th meeting with Mr. Setter at the Grotta D'Oro Restaurant. And Mr. Klein elicited in the Grand Jury you stated it was April 25th. Do you recall that?

A Yes, sir.

Q Now, would you take a look at Government 25-3 and tell the members of the Grand Jury (sic) when this report is dated--let me rephrase the question.

There is a date in the upper left hand corner here. It says, 4-24-75.

What does that date refer to?

A The date the report is written out.

Q At your office?

A Yes, sir.

Q Now I would like to refer your attention to Paragraph 2 of that report and that paragraph, does it not, tell us the date that you went to the Grotta D'Oro Restaurant? Is that correct?

A That's correct.

Q What date does this report indicate that you went to the Grotta D'Oro Restaurant?

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A April 25th.

Q Is that correct or incorrect?

A Incorrect.

Q And, in other words, the report is dated 4-24-75 and it is talking about supposedly a future date that hasn't occurred yet?

A As it is here, that's the way it is.

Q Now, Mr. Klein asked you a lot of questions about your Grand Jury testimony and whether certain information is included in your Grand Jury testimony. You recall that? He asked you whether you made a statement about his girlfriend on April 28th. Do you recall that?

A Yes, sir.

Q And he asked you whether you recall anything about the Kel set in your Grand Jury testimony.

A Yes, sir.

Q And about the May 21st meeting, there was no mention of that in the Grand Jury testimony?

A Yes, sir.

Q And you recall who was asking you those questions?

A Him, sir.

I was asking you thbse questions.

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Did I ask you anything about that information

A No, you did not.

Q And is it your understanding a Grand Jury presentation is supposed to include all the details of the case?

MR. KLEIN: I object to that, your Honor.

THE COURT: Sustained.

MR. APPLEBY: All right.

Q When you testified you weren't testifying as to all the meetings with Mr. Setter. Is that correct?

A No, sir.

MR. APPLEBY: No further questions, your Honor.

THE COURT: Go ahead, Mr. Klein.

RECROSS-EXAMINATION

BY MR. KLEIN:

Q Did you tell Mr. Setter everything about your surveillance about this whole case, about the purchase and everything else?

MR. APPLEBY: Mr. Setter, Mr. Klein?

MR. KLEIN: Excuse me, I meant Mr. Appleby.

Q When did you tell Mr. Appleby, the prosecutor, everything that happened, that you observed?

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THE COURT: At what point in time?

MR. KLEIN: At any point, your Honor.

Q Before you went to the Grand Jury didn't you include it in your reports?

A Not everything. I discussed the events as I could remember them to Mr. Appleby.

Q Right.

And when did you first talk to Mr. Appleby about this case?

A I believe it was a day before the presentation.

Q Did you tell Mr. Appleby--by the way, did Mr. Appleby have your reports at that time?

A Yes, sir.

Q And these reports were made a day before or after the events?

A The day after the events.

Q Did you tell Mr. Appleby when you went there on April 28th to buy this cocaine and it was short weighted and Mr. Setter said, "I don't know how this happened, my girlfriend must have messed around with it?"

A Yes, sir.

Q You told that to Mr. Appleby?

A Yes.

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Q He didn't ask you that in the Grand Jury though?

A No, sir.

Q Did you tell him all these other things that were not asked of you in the Grand Jury about the Kel transmitter--did Mr. Appleby know there was a Kel transmitter used on April 17th?

A Yes, he did.

Q He didn't ask you about it though, did he?

A No, sir.

MR. KLEIN: I forget the other thing, whatever it was.

Q Did Mr. Appleby know the other item--it slips my mind for the moment--that you omitted that you didn't testify before the Grand Jury?

MR. APPLEBY: I object, your Honor.

THE COURT: Sustained.

Q You say that the date in the body of that report of yours, April 25, is incorrect, it should be April 24th?

A Yes, sir.

Q Is that the only error? Is that the only error in the report?

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A I don't recall, sir.

MR. APPLEBY: I will ask for a more specific question than that.

THE COURT: Well--

Q How about the date of the report itself?

THE COURT: I will permit it, I will permit it.

A The date of the report is also incorrect.

Q So there are two things wrong?

A Yes, sir.

Q Mr. Appleby asked you that?

A I don't believe he knew at that time.

Q In other words, the report should have been made out on April 25 and it should have referred to a meeting on the 24th?

A That is correct.

Q And the way it's made out now, it's dated the 24th and it refers to the meeting on the 25th?

A That's correct.

Q Isn't it correct, Mr. Copeland?

A Yes, sir.

MR. KLEIN: All right.

MR. APPLEBY: No further questions, your Honor.

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THE COURT: All right.

Are you finished with this witness?

MR. KLEIN: Yes, sir.

THE COURT: All right.

Thank you. You may step down. Thank you.

(The witness steps down from the witness stand.)

MR. APPLEBY: With the Court's permission, I would like to call a witness out of order. He is a busy man, you will see, and he is here today.

THE COURT: Bring him in.

MR. APPLEBY: Your Honor, the Government calls Mr. Sawinski.

THE COURT: I have a meeting at 4:30, so it depends on how long this witness goes. I may have to leave about that time.

MR. APPLEBY: May I have a side bar, your Honor?

(The following takes place at side bar and out of the hearing of the jury.)

MR. APPLEBY: The chemist analyzed also items that were seized and he would have to testify about those items and there was no testimony about the seized items yet. I would like

EXCERPTS FROM TRIAL TESTIMONY - WILLIAM RAWALD



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to get him in, but Mr. Klein tells me he is going to cross-examine the chemist and we will not be able to finish him anyway. And perhaps I can put up a few chain of custody witnesses.

THE COURT: Could you do that?

MR. APPLEBY: Yes.

THE COURT: All right.

MR. APPLEBY: Can you ask him to come back tomorrow, your Honor?

THE COURT: Yes.

(The following takes place in open court and in the presence of the jury.)

MR. APPLEBY: At this time, your Honor, the Government will call Sgt. William Rawald.

W I L L I A M R A W A L D, sworn.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q State your position, Sgt. Rawald, please.

A Yes.

I am a sergeant employed by the New York City Police Department, presently assigned as a group supervisor of the New York Drug Enforcement Task Force.

Q And how long have you been employed by the New York City Police Department?

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A A little over nineteen years.

Q How long have you been a supervisor in the Task Force?

A About five years.

Q Now, you are the--one of the case agents in charge of the Setter case. Is that correct?

A Yes, sir.

Q And I would like to direct your attention to April 17th--incidentally, do you recognize the defendant Setter in the courtroom?

A Yes, I do.

Q Would you point him out, please.

A Yes, sir.

He is seated next to Mr. Klein there wearing a brown suit.

THE COURT: Indicating the defendant.

MR. APPLEBY: Thank you, your Honor.

Q I would like to direct your attention to April 17th, 1975.

A Yes, sir.

Q Where were you and what were you doing at that time?

A At that time I was a group supervisor in group fifteen in the New York Task Force.

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Q And were you on a surveillance team at that time?

A Yes, sir, I was.

Q Would you tell the members of the jury where you were.

A On that particular one I would appreciate it if I could refresh my memory on the notes.

Q Yes, sir.

(Documents referred to handed to the witness.)

Q I show you Government's 3500-2.

A Okay.

Q Where were you, sir?

A On the afternoon of April 17th I was in the vicinity of 56th Street and Glenwood Road supervising a surveillance team.

Q And who were the other members of the surveillance team?

A May I refer to my notes to get the names of the other members?

It was myself, Police Officer Golub, Detective Sierra, Det. Copeland, Special Agent Richel, Special Agent Rose, Special Agent Eber (phonetic spelling) and

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Investigator Boss of the State Police, and also Police Officer Ryan.

Q Did there come a time you met Det. Copeland?

A Yes, sir.

Q When did you meet him?

A In the early afternoon of the 17th.

Q Did you meet him near Mr. Setter's residence?

A I met him in the Task Force Office.

Q Did there come a time you met Mr. Rosenberg?

A Yes, sir.

Q Where did you meet Mr. Rosenberg?

A In the Task Force office.

Q Did there come a time you met him near Mr. Setter's residence?

A Yes, sir.

Q Did there come a time you received anything from Mr. Rosenberg?

A Yes, sir.

Q Would you tell the members of the jury what you received?

A Yes, sir.

I received a package from Mr. Rosenberg. It was

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a brown paper bag that contained a plastic bag and in the plastic bag there was a white powder.

Q What did you do with those items?

A I conducted a field test on the powder at that time.

Q What were the results of the field test?

A It was a positive reaction for a positive cocaine derivative.

Q What did you do with the items after you field tested them?

A I brought them to the New York Task Office and returned them to Det. Copeland, gave them to Det. Copeland.

Q Sir, I show you Government's 1 and ask you whether you recognize it?

A Yes, sir.

Q What do you recognize it to be?

A It appears to be the same package that I received from Mr. Rosenberg which I had turned, surrendered to Det. Copeland.

Q How do you know that that's the same package?

A I'm not positive it is, sir.

Q Do you recognize any initials?

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A I recognize initials put on by members of my team, yes, sir.

Q Agent, I would like to direct your attention to July 3rd, 1975.

Were you on duty that date?

A Yes, sir, I was.

Q And directing your attention specifically to the morning, where were you?

A That morning I was in the vicinity of 56th Street and Glenwood Road in Brooklyn.

Q What was your purpose of being at that location?

A I was supervising a team that was going to effect the arrest of Mr. Setter.

Q Did there come a time when you did arrest Mr. Setter?

A Yes, sir, I did.

Q Would you tell the members of the jury how that occurred?

A Yes, sir.

Sometime around the morning, around 9:00 A.M. the morning of July 3rd, 1975, I observed Mr. Setter leaving his residence and going to a vehicle that was parked alongside his residence in the driveway.

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At this time via a two-way radio I instructed the other members of the team I had out there that we would place Mr. Setter under arrest at this time.

I then went over to Mr. Setter. I identified myself and let him know he was under arrest for violation of the narcotics laws.

Q Continue, please.

A After placing Mr. Setter under arrest I read him his rights. I then supervised--

Q Could you tell the members of the jury specifically what those rights were?

A Yes, sir.

Those rights were read to him from a form 13-A, DEA Form 13-A, which is a Drug Enforcement Administration Form which contains the defendant's rights after being arrested.

Q Do you recall what those rights were?

A I don't recall them exactly, but I do have the card with me that was used.

Q Would you produce that, please.

A Yes, sir.

MR. APPLEBY: I would ask that this item be marked as the Government's next Exhibit.

THE CLERK: Advise of rights marked

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Government's Exhibit 7 for identification.

(So marked.)

Q Sergeant, I show you Government's 7 for identification and ask you whether you recognize it?

A Yes, sir, I do.

Q What do you recognize it to be?

A I recognize it to be the Form DEA 13-A which I read to Mr. Setter advising him of his rights.

MR. APPLEBY: I offer Government Exhibit 7, your Honor.

THE COURT: Mr. Klein.

MR. KLEIN: No objection.

THE COURT: All right.

Mark it in evidence on behalf of the Government. Have the clerk mark it.

THE CLERK: Government Exhibit #7 previously marked for identification received in evidence.

(So marked.)

Q Now, you read to Mr. Setter the rights contained on this card. Is that correct?

A Yes, sir.

Q What did Mr. Setter indicate?

A He indicated he understood them, sir.

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Q Well, perhaps you should read specifically what those sections were and what Mr. Setter's responses were to each of those questions.

A The questions I read to Mr. Setter were:

Before we ask you any questions, it is my duty to advise you of your rights.

Do you understand that you have the right to remain silent?

Q What did he say?

A To which Mr. Setter acknowledged, yes.

I said, do you understand that anything you say an be and will be used against you in a court or other proceedings?

To which Mr. Setter responded, yes.

And then I said, you understand you have the right to talk to a lawyer, before we ask you any questions and to have him with you during the questioning'

And Mr. Setter responded yes.

I asked him, if you cannot afford or otherwise obtain a lawyer and you want one, a lawyer will be appointed for you by the United States Magistrate or the Court and we will not ask any questions until he has been appointed.

And then I said, if you decide to answer now

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r without a lawyer, you still have the right to
he questioning at any time or stop the questioning
e purpose of consulting a lawyer. However, you
ive the right to advice of counsel and the right
ain silent and you may answer questions and make
ement without consulting a lawyer, if you so
.

I then asked him, do you understand your rights?

To which Mr. Setter acknowledged, yes.

I said, do you elect to waive them?

And Mr. Setter responded yes.

Q After you read him his rights what occurred?

There was a cursory frisk conducted of Mr. Setter
e sure he wasn't armed. He had no weapons on
anything.

He then told me he would like to go back into the
for several reasons. He said he had to feed his
something and make a phone call, I don't know
was to his girlfriend or his employment. And he
to go back into his house and I told him it would
y. And he said he would appreciate it we would
et not to let people in the neighborhood know that
being arrested, and especially his parents, who
ery ill and lived downstairs in the house in which

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he resided.

I then instructed the other officers who were with me to try to keep everything nice and quiet and let's go into Mr. Setter's residence and take care of whatever he had to.

Mr. Setter then opened the door to his residence, utilizing the key he had.

I went into the house behind him and the other officers followed me.

When we got into the house I asked Mr. Setter if he had any other cocaine or any other narcotics or anything. If so, it would be best that he surrender them to me.

Mr. Setter then said he did have something else. He went into a rear bedroom to which I followed him. He went into the closet in that bedroom. He opened the closet door. Inside the closet was a locked steel file cabinet, I think it was a four or five drawer cabinet, I forget which.

He opened the second or third drawer on the cabinet and after he opened the lock on the cabinet and removed from that drawer a shoe box. He took the shoe box out of the drawer and turned around and went to hand it to me. I stepped aside and he handed it to

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Police Officer Marrero, who accepted it.

Mr. Setter locked and closed the cabinet and he went back out to the kitchen area of his residence.

I believe he left a note or something for his girlfriend and he called his place of business. And I don't recall if he did feed his cat or not, but I know it was mentioned to him he was going to, or by him, rather.

We then left his residence. I placed him in the custody of two other officers who were there and I proceeded back to the Task Force Office.

Q Was the contents of that shoe box field tested at any time in your presence?

A I believe it was, yes, sir, at the Task Force Office.

Q What were the results of the field test?

A Positive derivative of cocaine.

Q Do you recall specifically what was inside the shoe box?

A Exactly what, no, sir, I don't recall.

Q What kind of items?

A There were bags with white powder in it. I believe there were bottles with some pills and there were other paraphernalia inside the shoe box.

He is not an eye witness, he is an accusor.

THE COURT: Let me ask you this: In connection with the defense, is the defense going to be alibi, if you wish to disclose it to the Court?

MR. KLEIN: Yes.

THE COURT: It is?

MR. KLEIN: Yes.

THE COURT: Did you advise the Government of this prior to trial?

MR. KLEIN: Yes. And they have interviewed the witnesses, your Honor.

MR. APPLEBY: Yes, he has.

MR. KLEIN: I don't want to say this in front of the jury, but we don't deny that sales or purchases -- that those two were made; but not on those dates.

THE COURT: I see.

MR. KLEIN: I was hopeful that the suppression hearing would have resulted differently and then I may have gone just on the alibi. But now the alibi can't help on a mere possession on the day of the arrest. It only goes to the

sale of the particular event. So alibi wouldn't go across the board.

So, while I have alibi on the sales, I have entrapment to show that Harvey Rosenberg was the one who worked on Setter, worked on Setter and worked on Setter. And this whole string of events, the sale and possession, came as a result of being entrapped.

THE COURT: As to the question of the introduction of the testimony of Mr. Rosenberg, the Court will have to consider that. I will not make a decision as to that at this time.

MR. APPLEBY: Very well, your Honor.

THE COURT: Are you going to bring Mr. Rosenberg in now?

MR. APPLEBY: He is not in the courthouse yet, your Honor.

THE COURT: Do you want to get started?

MR. APPLEBY: Yes.

There is one other matter I would like to bring out.

THE COURT: Yes.

MR. APPLEBY: Your Honor did not allow me to introduce Exhibits 1, 2 and 3. And I

understood the reason you did not allow me to introduce them was the chain of custody. Is that correct?

THE COURT: You mean 1, 2 and 3?

MR. APPLEBY: Yes, your Honor.

THE COURT: No, 3 and 4 was the chain of custody.

MR. APPLEBY: No, Exhibit 1 was the cocaine.

THE COURT: As to 1, you haven't connected that to the defendant; no question.

MR. APPLEBY: Your Honor, the testimony was that the informant went into Mr. Setter's residence without anything on his person. He came out with a package.

THE COURT: How do we know who was in there? Nobody told us this actually happened. You haven't connected that in no fashion.

The fact that he goes into a man's house, there might have been ten other people in there.

MR. APPLEBY: I just read a case that the Government does not have to prove beyond a reasonable doubt -- the Government can rely on

reasonable inferences in order to prove it, that he got it from the defendant Setter, the informant.

Furthermore, your Honor, there will be a recording between Mr. Setter and Rosenberg inside the house in which they are discussing the transaction.

THE COURT: Then if there is additional proof which can definitely link Mr. Setter to that particular piece of evidence, then at that time the Court will consider it. But not for the proof you have given the Court to this point.

MR. APPLEBY: I would respectfully disagree. Even without that recording the Government would show circumstantially it certainly came from the defendant Setter.

THE COURT: It's by inference.

MR. APPLEBY: That's correct. We are allowed to draw reasonable inferences from the actions of the informant.

THE COURT: What proof is there that Mr. Setter was in that house at that time?

MR. APPLEBY: He lives there.

THE COURT: So? He is not there now,

is he?

MR. APPLEBY: Furthermore, Detective Copeland just a week later went into the same house and met the defendant.

THE COURT: That's different. That -- he actually confronted this man. There is no question as to that.

MR. APPLEBY: I think there is a reasonable inference if Detective Copeland purchased cocaine on the 28th with him and went with the informant to the residence of Setter a week before, it's a reasonable inference that the informant also purchased cocaine on the 17th from the defendant.

THE COURT: I would like to agree with you, but I don't know that I can.

MR. APPLEBY: Your Honor, there was a witness who saw Mr. Setter go into the residence that day just before the transaction. I could put him on also.

MR. KLEIN: That will be insufficient. The proof will show Mr. Setter lived there with a girlfriend and other people at the time.

MR. APPLEBY: We don't have to exclude

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every possible inference that exists, your Honor. As long as it's a reasonable inference that it is the defendant, the jury is the one who is entitled to decide it was the defendant. He can argue in summation it wasn't him. That's his right.

We have an officer that saw Setter go in just prior to the transaction and we have a recording between Rosenberg and the defendant on the same day and a week later an undercover officer purchased narcotics from the defendant. And I think the proof is overwhelming, your Honor.

MR. KLEIN: I don't think you can infer someone was in the house and he was the only one in the house behind four walls. It's an inference on an inference.

MR. APPLEBY: Mr. Klein's argument is that I have to exclude every possible possibility.

THE COURT: Not every possible possibility, but you must give direct proof which would show that the defendant was the one who did the act and the only one.

MR. APPLEBY: I am not sure I understand

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what you mean by direct proof.

THE COURT: Listen. The next week when Detective Copeland went there he told us who he saw and he told us who he bought it from. No question. That's direct and complete.

MR. APPLEBY: With all due respect, your Honor, I think circumstantial proof is just as valid as direct proof. And I ask your Honor to listen to the recordings in any event and after you hear the recordings and you hear one of the other detectives who put Setter in the apartment just prior to the transaction and would link the narcotics to Setter at any rate.

THE COURT: I will consider it and give a decision on that.

MR. APPLEBY: Yes, sir.

MR. KLEIN: We have a further point, your Honor.

Even if your Honor should agree with the prosecutor, we don't have the chain of custody either on that point.

THE COURT: Well, chain of custody he has to show on that evidence, too. And in the event the Court decides that it could be received --

MR. APPLEBY: As far as the chain of custody, your Honor, I did research on it. The question of the chain of custody does not go to the admissability to the evidence, but to the weight that it has.

If Mr. Klein wants to prove there was no chain of custody, that's his right. But there is ample case law that says the chain of evidence goes to the weight of evidence and not the admissability.

We will prove chain anyway.

THE COURT: Then there is no problem.

MR. ABBLEBY: But even if there was no chain of custody, it wouldn't be admissable.

THE COURT: There will be no problem. But the Court prefers you do it under those circumstances.

MR. KLEIN: I have a housekeeping matter.

Unknown to me I have a client who is in the MCC, and he called me last night at home and he told me he is scheduled to appear before Judge Constantino this morning. And I tried to remember what it was, but I think

MR. APPLEBY: Yes, sir.

THE COURT: What is the connection?

MR. APPLEBY: If you turn to the first head note in the opinion itself, reading from the top here.

THE COURT: Anything you wish to say in connection with this?

MR. APPLEBY: Yes.

I would like to quote from the head note there where it says that direct proof is not necessary, and the bottom of the head note says the Government need not exclude every hypothesis of what may have occurred inside the defendant's house, something to that effect. I don't have the opinion in front of me.

THE COURT: Yes. I will look at it and I will let you know after that.

MR. APPLEBY: Very good, your Honor.

Now, Mr. Klein asked for the DEA for the 7th.

SERGEANT RAWALD: 17th.

MR. APPLEBY: Yes, 17th.

They have now been marked 3500-14 through 3500-21, the originals. And since

I don't have a copy, you can look them over and give them back to me.

MR. KLEIN: These are what?

SERGEANT RAWALD: Basically to show the man was in the office and he was out and in the general vicinity of where he was.

MR. KLEIN: A DEA 6 is the man's own report?

SERGEANT RAWALD: His factual report as to what occurred. And this report places him in the office or out of the office.

MR. KLEIN: That's what I'm trying to establish with Mr. Copeland yesterday. He made no daily reports of the events of that day.

THE COURT: He made no daily reports of a specific date.

MR. KLEIN: Yes, sir.

THE COURT: If he didn't make them --

MR. KLEIN: I would like to recall the sergeant just for these papers.

SERGEANT RAWALD: Basically is -- what it does is it puts the detective on the -- at the restaurant on the date in question.

This is made out on a

daily basis and submitted and held --

MR. KLEIN: Why do you need this if you have the DEA 6?

SERGEANT RAWALD: You do many things on one day. On some of them there are four different cases. And as a matter of fact, on that day the detective did four different buys and the DEA 6 refers to one case. This refers to the activities of the day.

THE COURT: Do you want to call the detective?

MR. KLEIN: Not yet. I would like to take a look at this first.

THE COURT: What date does it put the detective there?

SERGEANT RAWALD: I believe it's the 21st of May where there was no DEA 6 made up for that day.

(Mr. Klein confers with Sergeant Rawald out of the hearing of the Court Reporter.)

MR. APPLEBY: Maybe we can do this later.

THE COURT: Yes, we can do this later. Are you ready to proceed?

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THE COURT: Yes.

Sergeant Rawald, return to the stand.

L L I A M R A W A L D, previously sworn, resumes the stand and testifies further as follows:

THE COURT: You are still under oath.

And you may proceed, Mr. Klein.

OSS-EXAMINATION

MR. KLEIN:

Q Good morning, sergeant.

Good morning, sir.

Q Sergeant, you were testifying about this id --

MR. APPLEBY: I object to the word "raid", your Honor.

THE COURT: I will sustain it.

MR. KLEIN: All right.

Q You testified that the morning -- six fficers had Mr. Setter's house under surveillance.

Yes, sir.

Q And arrested him.

Yes, sir.

Q What was that date?

A July 3, 1975, sir.

Q What time?

A Around -- well, approximately 9:00 A.M.

Q How long had you had the house under surveillance?

A Approximately an hour, I guess. I didn't have it directly under surveillance at all times, but other members of my team did.

Q Did you see a young lady leave the house approximately 15 minutes before Mr. Setter did?

A No, sir, I didn't.

Q The other day when I asked you some questions outside the presence of the jury on the stand you didn't tell me at that time you didn't have the house under surveillance at all times?

A I don't recall if I did or I didn't, sir. It's possible I didn't.

Q You did hear Officer Ebert testify he saw a young lady come out of the house?

A Yes, sir, I did.

Q You heard him say that?

A Yes, sir.

THE COURT: As to that, Mr. Klein,

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on the situation you're talking about, Sergeant Rawald testified that he did not see the young lady. Agent Ebert testified he did see the young lady.

MR. KLEIN: Yes.

THE COURT: That's still the situation.

Q You testified before Sergeant Ebert -- Agent Ebert. Is that right?

A Yes, sir, I believe I did.

Q Now, when you arrested Mr. Setter did you have a gun with you?

A Yes, sir, I did.

Q Did you take your gun out?

A Yes, sir, I did.

Q Did the other officers take their guns out?

A To the best of my knowledge, they did. They were behind me, sir, but it's normal procedure to have the gun out during an arrest.

Q Six officers and agents brandishing guns?

A Doing what, sir?

Q Brandishing guns.

A I don't know if they all had them out. I believe they did. They did have them out and exposed for the defendant to see.

Q Were they pointed in the direction of the defendant?

A I would say in all probability they were.

Q You told him he was under arrest then?

A Yes, sir.

Q You read him his rights at that time?

A After I identified myself and told him why, what he was being arrested for, I did read him his rights, yes.

Q What was he being arrested for?

A Violation of the narcotics laws, sir.

Q One of the other counts in this case?

A Excuse me?

Q Which particular incidents?

A For the sales, for the prior sales and possession, the prior counts.

Q You mean the one Mr. Copeland testified about?

A That's one and another one prior to that.

Q That one and the one with Harvey Rosenberg?

A Yes, sir.

Q Those are the two that are named in this indictment, you mean?

A Yes, sir, to the best of my knowledge they are.

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Q Yes.

And when you were reading these rights to him, where was this? Outside the house?

A Yes, sir.

Q And was Agent Ebert in the vicinity?

A Yes, sir, he was.

Q How far away from you was he?

A I don't know, sir. They were behind me. I was directly facing Mr. Setter.

Q What was Mr. Setter doing when you apprehended him?

A He had exited his house and he had walked into a driveway which was alongside the house and he was attempting to enter a vehicle that was parked there, his car, I believe it was.

Q What kind of vehicle was it?

A Excuse me, sir?

Q What kind of vehicle was it?

A I don't recall at this time. I believe it was a Cadillac.

Q You know the color?

A Not offhand, sir, no. I have to refresh my notes on that.

Q Did you put him in handcuffs at that time?

A At that time I don't believe so, no, sir.

Q Did you search him for weapons?

A He was given what is known as a frisk at that time, which is not a complete search. He was patted down to see if he had any knives or guns or any large objects on him which we thought could endanger any of the officers.

Q Did he have any?

A No, sir.

Q Did you then take him down to your headquarters?

A No, sir, not immediately.

Q What did you do with him?

A We then re-entered Mr. Setter's house. Mr. Setter at that time, when he was placed under arrest, told me he had some unfinished business in the house, as I testified before, whether he had to feed the cat or call his girlfriend or call his place of business. I forget exactly what it was, but I recall one detail was something about feeding the cat.

After placing Mr. Setter under arrest he didn't offer any resistance. He seemed very cooperative and he asked us not to make any noise to disturb his parents who were downstairs, they were elderly and

ill, and also not to let any of the neighbors know what was going on. We then proceeded and Mr. Setter --

Q Wait, wait, wait.

A I'm sorry. You asked me what occurred after the arrest.

Q I asked you where you took him after the arrest.

A Right.

Q I'd like to ask the questions.

A I'm sorry.

Q Did you have an arrest warrant with you?

A No, sir.

Q You had a search warrant with you?

A No, sir.

Q There was none issued, was there?

A No, sir.

Q And do I understand, six officers with their guns drawn told the man he was under arrest for possession and sale of narcotics, two sales, and you read him his rights, he has the right to call an attorney, he doesn't have to make any statement, if he does it can be used against him? And then he says I would like to go back into the house to feed my cat and you walked him back into the house with him to feed his cat?

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A There was another brief conversation there during which time I felt Mr. Setter was not going to be a problem and --

Q I am not interested in how you felt, sergeant.

MR. APPLEBY: I ask the sergeant be able to finish his answers, your Honor.

THE COURT: I will permit Mr. Klein to the cross-examination.

Q You say you wanted to feed the cat, that's number one?

A That's number one. The exact order, sir, I don't recall.

Q Let me digress for a minute.

Did you see the cat?

A No, sir.

Q You don't know what color it is or anything?

A No, sir.

Q You didn't see him feed any cat?

Not that I recall, no, sir.

Q To your knowledge when a person leaves his house to go to work or leaves his house in the morning, they usually feed the cat in the morning?

MR. APPLEBY: Objection, your Honor.

THE COURT: Sustained.

Q In addition to saying he had to feed the cat, what other reason did he give for going back into the house?

A As I testified also, he said he wanted to make a phone call to his girlfriend or place of business, I'm not exactly sure.

Q Is that permissable to make a call to a girlfriend --

A Yes, sir.

Q -- or place of business?

Did he place a call to his girlfriend or place of business?

A There was a call that was made. I don't know where, sir.

Q Was it a call that was made or a call that came in?

A To the best of my knowledge, there was a call made, sir.

Q And that's the only reason you went back into the house?

A No, sir.

Q What were the other reasons?

A To gain Mr. Setter's confidence in me so he would

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trust me so, therefore, I allowed him to do these things.

MR. KLEIN: Can I have the answer read again?

THE COURT: I'm sorry?

MR. KLEIN: I didn't quite understand it. May the reporter read it to me?

THE COURT: Yes.

(The Court Reporter reads back the requested portion.)

Q Wasn't it one of your purposes -- excuse me, withdrawn.

You say you wanted Mr. Setter to trust you?

A Yes, sir.

Q Did you put away your guns?

A Yes, sir.

Q When did you put away your guns?

A Shortly after placing him under arrest when I knew we had enough manpower and Mr. Setter wasn't resisting in any way.

Q Wasn't one of the reasons that you went into the house to seize the cocaine that was there?

A No, sir.

Q Was there any talk of cocaine or drugs

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outside the house about possession of it?

A Other than the fact that I advised Mr. Setter he was being arrested for narcotic violations, there was none other.

Q That's what I mean, other than that.

A No, sir.

Q Did you ask Mr. Setter outside the house, "Do you have any drugs or narcotics, and if you do, I suggest it would be best for you to turn it over voluntarily?"

A No, sir, not outside the house.

Q Was the arrest complete outside the house?

A Was the arrest complete?

Q Yes, sir.

A Yes, sir, the arrest was complete.

Q Did there come a time when you asked Mr. Setter if he had any narcotics or drugs in the house and, if so, you would recommend or suggest he turn it over voluntarily?

A Yes, sir, words to that effect were said to Mr. Setter.

Q Who said that?

A I did, sir.

Q When did you say it, sergeant?

A Shortly after -- right after we entered his house as a normal procedure I would ask somebody if they have anything, weapons or narcotics around, it would be best to surrender it.

Q Did you suspect there were drugs or narcotics in the house while you were outside?

A No, sir.

Q You say you came there with five other officers, drew your guns, you made an arrest outside the house and you advised him he was being arrested for possession and sale on two occasions?

A I don't recall if I told him it was on two occasions.

Q No, no, no. Maybe my phraseology is wrong.

For two occasions, two sales?

A I'm not really sure whether I explained for two sales or not, but I did explain it was -- he was being arrested for narcotic violations.

Q All right.

And you had no idea there were any narcotics in the house until you got in the house and you asked him and he told you?

A I felt there was a possibility as I do with anyone I arrested for narcotic violations that there was

A-206



other narcotics.

Q Weren't you part of the surveillance team when Harvey Rosenberg, the informant, came in Detective Copeland's car and parked in the area and then went into the house twice?

A Yes, sir, I was.

Q And weren't you part of the surveillance team when Detective Copeland made his direct purchase?

A Yes, sir, I was.

Q And both -- the site or sites of both of those purchases or the place was the house in which Mr. Setter lived?

A Yes, sir.

Q And I ask you again, on the day you apprehended Mr. Setter as he was leaving the house in the morning outside of his driveway and you placed him under arrest at that time, did you have any idea that there would be narcotics or might be narcotics in the house?

A I had my professional feeling there was a possibility of it, yes, sir.

Q And you did not discuss it with him outside the house?

A No, sir.

A-207



Q And if he didn't say he had to feed the cat or make the phone call to his girlfriend you wouldn't have entered the house?

A If he didn't say things like that, no, sir. We would have taken him to the office.

Q And you would have walked away from the house?

A Yes, sir.

Q Even though there was a possibility that there might have been cocaine or any other narcotics in the house?

A Yes, sir.

Q How long a period of time had Mr. Setter been under surveillance?

A When, sir?

Q Over any --

A Any particular day?

Q Any period. I don't mean that morning.

A That's what I mean, sir. You mean from the time that we --

Q From the beginning to the end.

A The first time, to my knowledge, that Mr. Setter was under any surveillance was shortly before the first day when we went there with Mr. Rosenberg and

A-208



Copeland.

Q That would be April 17th?

There might have been some quicky type sur-
llance done to establish that the house was there
nything else by one of my surveilling officers.
ll probability, there was -- when we had first
me aware of Mr. Setter's address, it's normal
cedure we would go and check out and make sure a
ject by that name does live at that residence and,
ll probability, I did have one of my agents per-
m this.

Q Did Mr. Harvey Rosenberg tell you about
Setter?

Yes, sir.

Q And when was that?

That was shortly before the period we went out
meet Mr. Setter. The exact date I don't recall,
.

Q All right.

So that would be shortly before April 17th?

Yes, sir, several days before that.

Q Several days.

When was Mr. Setter placed on surveillance
his house?

A-209



A He at his house?

Q Yes.

A The first time he was placed under any direct surveillance was the day we went there with Mr. Rosenberg.

Q And how about himself and his place of business?

A To the best of my knowledge he was at no time -- yes, possibly on that day and possibly on the day we went back with Mr. Copeland there was surveillance set up in the areas of his business to establish that he was leaving from his business to return to his home. At no other time was there surveillance conducted of his business.

Q Was there any surveillance -- excuse me.

Was surveillance conducted at his house right up until the day of his arrest?

A No, sir.

Q And during that period had he been under surveillance from time to time?

A Very minimal, if any, sir.

Q Are you color blind?

A No, sir, not to my knowledge.

Q You say you observed a field test being made?

A-210



A Yes, sir.

Q And who made the field test?

A When are we speaking about, sir? Which particular field test?

Q Let's take the first time.

A The first time, that's the exhibit Mr. Rosenberg had. That's the one that I conducted the field test on, sir.

Q And do you know what chemicals are used?

A I used a cobalt test for my test. I did a test on the street.

Q Did you take a sample?

A Yes, sir.

Q You didn't test the entire item, you tested the sample?

A Yes, sir.

Q And the sample, I believe, came from Exhibit 1 for identification?

A Yes, sir.

Q And other than the sample you didn't test the remainder, the residue here?

A No, sir.

Q And is any part of the sample remained?

A No, sir.

indictment, you mean?

A Yes, sir, to the best of my knowledge they are.

A-21



Q So if the defense wanted to bring it's own chemist in to check the same sample to see if it got the same results from that test, it would be unable to do so. Isn't that right?

A Even if I had you would be unable to do so because once the test is done on the sample it can't be done twice.

Q Did you make any notes as to that test?

A Did I make any notes? No, sir; no direct notes.

Q And is that test a color test?

A Yes, sir, it is.

Q What color came out?

A It's like an aqua or a light blue color, from a clear -- do you want me to go through the test, counsel, please?

Q Yes, please.

Excuse me, do you have any degree in botany, chemistry or physics?

A No, sir; only in criminal justice.

Q And this is a field test?

A Yes, sir.

Q And you took the chemical out of a bottle?

A No, sir, not in this particular test.

Q What did you do?

A-212



A In this particular test the chemical comes in a self-contained vial which is sealed.

Q Do you know of your own knowledge what was in that vial?

A No, sir.

Q So you're saying you put the content of some vial onto this sample that you took and the sample turned -- you shook it up and then --

A What happens, it's a sealed vial that's given to us through the Drug Enforcement Administration they purchase through a laboratory. It's a sealed vial. We open the vial. The vial is cracked open. A small amount of the suspected narcotic is taken from the package, usually by a match, the end of a match, and dropped into the vial which has a small clear chemical solution on the bottom.

The vial is then shaken and if there is a possibility of their being cocaine present, the liquid will turn an amber blue color, light blue coloring. And it's only indicative of the possibility of it being cocaine.

Q It's not a shear test?

A No, it's not a conclusive test.

Q Isn't that true, that the test you described

merely determines the presence of an alkaloid substance?

A I really don't know. I know it determines it's a possibility of it being cocaine. If the test is negative, we know there is no cocaine.

Q Do you know that cocaine is an alkaloid?

A No, sir.

MR. APPLEBY: Your Honor, there will be a chemist testifying today. I think we are getting into technical matters.

THE COURT: Bring in a chemist. This man just did a field test.

MR. KLEIN: I would like to ask something else.

THE COURT: Ask him anything you wish.

Q You know there is a certain laxative on the market that has alkaloids and reacts in the same way to that test as you just described?

A Possibly. If you tell me the name of the laxative, perhaps.

I know Lidocaine and propane produces the same result in a field test of that type.

Q And you can also get alkaloids which are not narcotics which produce the same result when the

A-214



same test is applied? Isn't that so?

A I don't know. I have never conducted that.

Q Did you have to heat --

A Excuse me, sir?

Q Did you have to heat the contents of that solution?

A Did I have to heat it?

No, sir.

Q Was any part of the house searched by you or the other officers?

A No, sir, not to my knowledge.

Q All the other officers were in your sight in the house at all times?

A No, sir, they were behind me at times.

Q Were all the other officers in the same room as you were at all times?

A To the best of my knowledge we were all in the general vicinity following through the house.

Q You talked about a closet in which there was a file cabinet.

A Yes, sir.

Q With relation to the doorway to that particular room, what room was it, by the way?

A It was in a rear bedroom, sir.

A-215



Q How big was the bedroom?

A It was a small room, sir. I would say possibly ten by twelve. It wasn't too large.

Q Did it have a bed in it?

A Yes, sir.

Q And did it have other furniture in it?

A I believe it did, I believe it had a bureau and --

Q And where was the closet as you come in the doorway?

A As you come in the doorway you turn to your right and the closet I'd say is probably about three foot to the right.

Q When you were looking -- was your back to the doorway at the time you -- at the time Mr. Setter was opening the closet?

A No. In fact, I was facing the doorway more or less at that time. Because we came in, made a right and then we made another right to face that closet door. There were U-turns, so to speak.

Q So there were seven people in there. Is that right?

A Yes.

Q Mr. Setter and six agents?

A Yes.

A-216



Q Were all seven of you in the same bedroom or were there some in the adjoining room?

A I really don't recall, sir. There may have been some on the peripheral of the doorway. I really don't recall where everyone was.

Q And you say that Mr. Setter went to the closet, opened it up, opened the file cabinet and he reached in and picked a particular box, a Thom McAn shoe box?

A Yes, sir.

Q And he handed it to who?

A To Police Officer Marrero, sir.

Q Did you feel and rely solely on his word that there was no other narcotics in the house at that time?

A No, sir, I didn't rely on only his word.

Q Did you look in the drawer or any other of the other drawers to see if there were any other narcotics?

A No, sir. I have no idea what was in that file cabinet.

Q Didn't you think it was part of your function as a law enforcement officer, a narco officer, having found, having arrested a man who was accused

and suspected of having made two sales of narcotics, having come into his house, asking him where the narcotics are and to turn it over, and he turns it over voluntarily, you said, he turned it over to you and you don't look for anything more, you took his word that there was nothing else in the house?

A I had no right to look for anything, sir.

MR. APPLEBY: I think Mr. Klein is getting into a question of law and search warrants, etc.

THE COURT: That's all right. I will let him proceed.

MR. KLEIN: Yes, I am. And I think I am entitled to it.

THE COURT: Go right ahead, Mr. Klein.

Q You're saying here that neither before or after you received the box containing that Exhibit 1 for identification, that neither you nor any of your officers searched the house for other drugs or narcotics? Is that what you're saying?

A That's correct, sir.

THE COURT: Is that Exhibit 1 for identification?

MR. KLEIN: That was in the box?

A-218



MR. APPLEBY: No, sir.

THE WITNESS: No, sir.

MR. KLEIN: I assumed so.

THE COURT: No, not exhibit, not Exhibit 1.

Q Forget what I said about Exhibit 1.

In other words, the contents of the box, that's what I'm talking about.

A Yes, sir.

Q Neither before or after you received the box and its contents, did you or any of the other officers make any search whatsoever of any of the rooms in that house?

A No, sir.

Q Weren't you there -- excuse me, what was the purpose of you being there, to see that he fed the cat?

A To feed the cat and make a phone call.

Q You weren't there to seize any narcotics to be found?

A I was there -- when I went inside I asked him if he had any others.

Q Suppose he told you, no, he didn't.

A That would have been it, sir.

A-219



Q What?

A That would have been it.

Q That would have been it?

A Yes, sir.

Q Was the closet door open or locked?

A I thought it was open, sir.

Q Was it closed or open?

A It was a closed door. The door was definitely closed.

Q It was a closed door?

A Yes, sir.

Q And was the file cabinet closed?

A The file cabinet was closed and locked.

Q Closed?

A Closed and locked.

Q Closed and locked?

A Yes.

Q Did you say to him you better open this closet door and open this file cabinet or we'll bust this fucking place down?

A No, sir.

Q Did you go directly to the closet and the file cabinet?

A No, sir.

A-220



Q Did you know before you went to that house that there were any drugs in that closet and that file cabinet?

A No, sir.

Q Did you put the transmitter on Ha Rosenberg, the informant?

A No, sir, I didn't.

Q You were there when it was put on?

A Yes, sir, I was in the vicinity. I didn't watch the whole function of it being done.

Q What kind of device was it? Was it a Nagra or a Kel?

A It was a Kel transmitter, sir.

Q There is a substantial difference in size between a Kel and a Nagra?

A Yes, sir.

Q And is that because the Nagra is a self-contained unit with a reel or two reels in it?

A Yes, sir.

Q And the Kel is a little transmitter?

A A little transmitter with a large belt.

Q Well, the belt is worn under your shirt. Isn't that so?

A Yes, sir.

Q It's not exposed out in front?

A No, sir.

Q And then that belt, in addition to being a holder for the Kel, is also a means for concealment, isn't it?

A Yes, sir, I would say so.

Q Have you ever worn one?

A No, sir, I haven't.

Q Did you ever work in an undercover capacity?

A Yes, sir.

Q You never wore a Kel?

Did you ever wear a Nagra?

A No, sir.

Q Did you ever make a telephone conversation which was taped without the knowledge to the person whom you were speaking, you, yourself?

A Did I ever? No, sir, not to my knowledge.

Q You don't do those things?

A No, sir. It's not my function.

Q Were you and your team the arresting group insofar as Harvey Rosenberg is concerned?

A Yes, sir.

Q What was Harvey Rosenberg arrested for?

A Sale and possession of narcotics.

Q And when was that?

A I don't recall, sir.

Q It was before this April 17th day, it was before Mr. Setter came into the picture?

A Yes, sir; yes, sir.

Q And did Harvey Rosenberg enter into any arrangements with you or with the US Attorney's Office that you are aware of concerning his cooperation and possible reward in the way of leniency?

A I'm sorry, counsel. Can you rephrase that? I'm sorry.

Q Sure.

Any deal made or any arrangement made with Harvey Rosenberg that if he cooperated, that that fact will be made known to his sentencing judge and that he would be treated leniently upon his sentence?

A No, sir. What was told to Mr. Rosenberg is if he cooperated with the Government it would be made known to the judge. But as to the sentencing, I have no way I could tell him that it was going to be lenient or not. I would make the judge aware of the fact that he did cooperate.

Q And what kind of -- what was the -- what kind of cooperation was expected of him?

A What kind of cooperation, sir?

Q Yes.

A It was connected -- not expected, but he was asked to introduce undercover officers to narcotics violators of a higher degree than he was he was arrested for or give any information he could relating to narcotic violators.

Q And did he enter into that arrangement?

A Yes, sir, he did.

Q And over how long a period of time did he act as an informant?

A The exact time I don't know, sir; but I would say it's over a year.

Q A year and-a-half maybe?

A Possibly.

Q And how many different people did he reveal during that year and-a-half?

MR. APPLEBY: I object to a different case, your Honor, different case.

THE COURT: Sustained.

Don't answer that question.

MR. KLEIN: May I approach the side bar, sir?

THE COURT: Sure.

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(The following takes place at side bar and out of the hearing of the jury.)

MR. KLEIN: Just for guidance, I would like to know what was the reason for the objection.

MR. APPLEBY: I don't think it's relevant.

MR. KLEIN: I'm not going into the other things. I don't care about the other names or anything. I just want to show he broke cases over a period of time and he was working for the Government.

MR. APPLEBY: If he just mentions there were other cases, I don't mind. But --

MR. KLEIN: That's all.

THE COURT: All right.

(The following takes place in open Court and in the presence of the jury.)

MR. KLEIN: Would you read back the last question.

(The Court Reporter reads back the requested portion.)

BY MR. KLEIN:

Q Sergeant Rawald, sir, I am not interested in any names or anything about these cases. I am just interested in the totality of it generally.

About how many cases did he work on during that period?

A I would say about ten, possibly.

Q All right.

And then was it part of his function in all of these cases to introduce a suspected narcotics person to a member of your group?

A Not of my group necessarily, but to an undercover officer.

Q Yes, to an undercover officer.

And was it part of the modus operendi, if he could make the introduction, fine; sometimes did he even go so far as to make a purchase or to obtain a sample?

A Yes, sir.

Q And then he would try to make the introduction and have an actual direct purchase made by an undercover agent from that source?

A Yes, sir.

Q And it was part of this program of acting as informant that covered his activities insofar as

introducing or getting Joseph Setter to meet undercover Detective Copeland?

A Yes, sir.

Q Was he a paid informant?

A No, sir.

THE COURT: Who is this? Harvey Rosenberg?

MR. KLEIN: Harvey, Harvey.

THE COURT: Was he a paid informant?

THE WITNESS: No, sir.

Q He wasn't doing this for pay then, was he?

A No, sir.

Q Wasn't he doing it for reward because he would hope to receive a lenient sentence when the extent of his informing activities would be made known to the sentencing judge?

A I think so.

Q And didn't there come a time he pleaded guilty to his own charges?

A Yes, sir, I believe he did.

Q And didn't there come a time he received a sentence from his sentencing judge?

A Yes, sir.

Q To your knowledge did Harvey Rosenberg

tell you or anyone else that Mr. Setter did not want to meet Mr. Copeland?

A Yes, sir, I believe he did.

Q Do you know on how many occasions it was?

A No, sir, I don't.

Q Was it common knowledge among your group that Harvey Rosenberg was having trouble getting Mr. Setter to meet Mr. Copeland?

A I wouldn't call it common knowledge. He was aware of it and possibly the agent who was handling the case; probably that was it.

Q Who was that agent?

A At that time it was Police Officer Ryan who has since been transferred.

Q Over how long a period of time had you known or been aware of the fact that Informant Rosenberg was having difficulty persuading Mr. Setter to meet with Detective Copeland?

A Oh, I would say shortly before the introduction -- excuse me, shortly before Mr. Rosenberg went to Mr. Setter's house where Exhibit 1 was purchased. And at that time I believe the air was pretty cleared up that Mr. Setter would meet Mr. Copeland.

Q Mr. Setter went -- excuse me, Informant

A-228



Rosenberg had met with Mr. Setter, had he not, prior to the April 17th day?

A Oh, I'm sure he did on other occasions.

Q And wasn't it during that time that he made the approach and asked Mr. Setter if he wanted to meet with Mr. Copeland?

A It could have been, sir. I don't know for sure.

Q It wasn't until sometime after April 17th that Informant Rosenberg met with any success insofar as getting Mr. Setter to leave with Mr. Copeland?

A Shortly thereafter, yes, sir.

Q Have you ever been in Mr. Setter's premises before?

MR. APPLEBY: Before what, Mr. Klein?

THE WITNESS: Before July 3rd?

Q That's right.

A No, sir.

Q Were you part of the surveilling team on April 17th when Mr. Rosenberg went into the house?

A Yes, sir, I believe I testified I was.

Q Yes.

And did you see Mr. Setter in the house?

A Did I see him in the house? No, I didn't.

Q Do you know who else might have been in

A-229



the house of your own knowledge? Do you know who else might have been in the house to your knowledge at that time?

A Other than what I was told, no, sir.

Q And on the second occasion, the other occasion at 10:30 at night Detective Copeland came in?

A Yes, I believe it was 10:10, somewhere around 10:00 P.M. in the evening, yes, sir.

Q Do you know, of your own personal knowledge, who was in the house on that day?

A No, sir, I don't.

Q Did you see a man leave the house -- excuse me.

On the April 17th occasion when -- after Mr. Rosenberg came back and got into Detective Copeland's car and drove away, did you still remain in surveillance of the premises on that day?

A No, sir, I didn't. I had other officers who did. But I had left the scene.

Q All right.

Prior to Mr. Rosenberg going into the house on April 17th, were you there also?

A Possibly shortly before he arrived, yes, sir.

Q Did you see another man go into the house before?

A No, sir, I didn't.

Q How about on the other occasion, the evening occasion Detective Copeland testified to? Were you there after Detective Copeland left?

A No, sir. I believe I left shortly after Detective Copeland left.

Q Did you leave anybody behind?

A Yes, sir, I probably did as normal routine business.

Q How long were you there before Detective Copeland went into the house?

A Not too much longer before he came on the scene, sir.

Q Did you receive a report from any other of the other agents, particularly those which you left behind that another man was seen coming out of the house shortly after you left?

A On which occasion, sir?

Q April 17th.

MR. APPLEBY: I object to what he meant in his report. If he saw it, he can testify to it.

THE COURT: I will sustain that.

Q Are you aware there was another person in the premises when you left shortly after the transaction was completed on April 17th?

A To the best of my knowledge, I believe it was reported that somebody entered and left after Mr. Rosenberg left.

Q Right.

It was a man?

A I believe it was reported to me it was a male and a female who -- after Mr. Copeland had left, they pulled up in a car, entered Mr. Setter's residence, remained a short period of time and then left.

Q This is on April 17th?

A I believe so.

Q The day Rosenberg went in there?

A I believe so.

Q And was any attempt made to ascertain the identity of this man and woman?

A Only there was a motor vehicle check of the license plate of the vehicle they were driving.

Q Did you find out the name of the person?

A Of the vehicle, yes, I believe so.

Q The name of the person was in there?

A Yes, sir.

Q What was the name?

A I don't know. I have to look at the reports on that and I don't know if that's the person who went in there, sir. That's who owned the vehicle. That was the registered owner of the vehicle who pulled up to the house. As to who went in there, I don't know.

(Mr. Klein confers with the defendant out of the hearing of the Court Reporter.)

Q Would you -- would you say it was a 1971 grey Pontiac, license number --

A I didn't say the car. This is what was reported to me.

Q All right.

If I told you the car was registered to an Edward Zaremski in Brooklyn, Z-a-r-e-m-s-k-i, Brooklyn, would that refresh your recollection?

A It refreshes my recollection to the fact that one of the officers reported to me that that's who that vehicle is registered to. I didn't do the plate check myself, sir.

Q Edward Zaremski, do you know anything about him?

A No, sir, nothing whatsoever.

Q Do you know whether he is in the narcotics traffic?

A No, sir, not to my knowledge.

Q How about the other time when Detective Copeland was there at night?

A Yes, sir.

Q Was there any -- did there come to your knowledge whether anybody had entered or left or left afterwards?

A To the best of my knowledge on that particular night it was reported to me a short time after Detective Copeland left, all the lights in the premises went out and it appeared that whoever was inside was home asleep and nobody left or entered.

Q Did you see an antique scale in the house?

A No, sir, not to my knowledge.

Q How was Mr. Setter dressed the day he was arrested?

A I don't recall, sir. I would have to refresh my memory from my notes.

Q Did you place him in handcuffs?

A Did I, sir?

Q Was he placed in handcuffs?

A Yes, sir, he was.

Q And was he turned over then to two of the group?

A Prior to being placed in handcuffs, I believe I turned him over to one of the members of the group.

Q Agent Ebert and someone else?

A I believe, sir, it was Agent Ebert and Investigator Boss.

Q And they took him downtown?

A Yes, sir.

MR. KLEIN: Bear with me for a moment.

THE COURT: Sure.

(Whereupon there was a pause in the proceedings.)

Q Would you say the apprehension of Mr. Setter -- withdrawn.

Would you say that Harvey Rosenberg's activities in connection with Mr. Setter contributed to the apprehension of Mr. Setter?

A Definitely, sir.

Q Pardon?

A Definitely, sir.

MR. KLEIN: Your Honor, excuse me for a moment.

THE COURT: Sure, certainly.

(Whereupon Mr. Klein confers with the defendant out of the hearing of the Court Reporter.)

Q Do you recall -- was Mr. Setter ever handcuffed in your presence?

A He probably was, sir, I would say.

Q Do you have any independent recollection of whether he was handcuffed in your presence or whether that occurred later on with the other two officers?

A I would say I was probably still there because it's routine procedure that I instruct the officers, whoever are with me, to handcuff a defendant prior to leaving a place and putting him in a car or something. And I believe on this occasion, as on other occasions, and I believe it happened on this occasion, I instructed the officers to put a coat over the handcuffs so that it wouldn't be visible to the neighbors in the area, because I didn't want them to be aware of Mr. Setter's position since I anticipated his cooperation.

Q The place of arrest was outside the house?

A Yes, sir.

Q And then you left the place of arrest and went inside the house?

A Yes, sir.

Q And then he eventually left the house to get into a car, right?

A Yes, sir, after --

Q Do you say the first -- do you now have any independent recollection if whether at any time during that period he was handcuffed?

A Not prior to leaving the house, no, sir, I don't believe he was.

Q Are you sure he was handcuffed before he left the house?

A I'm almost positive, yes.

Q And can you state with definite certainty that he was handcuffed before he left the house?

A No, not with definite certainty, sir; to the best of my knowledge he was.

Q And is that based upon what you do normally?

A Yes, sir, plus, as I say, I do recall in this particular occasion taking particular note not to let anyone in the neighborhood know what is going on regarding Mr. Setter.

MR. KLEIN: I have no further questions.

THE COURT: Redirect, Mr. Appleby.

MR. APPLEBY: Yes, sir.

REDIRECT EXAMINATION

BY MR. APPLEBY:

Q Agent, why didn't you want the neighbors to know what was going on?

MR. KLEIN: I certainly object to why, your Honor.

MR. APPLEBY: Well, he --

THE COURT: I think it's been explained. I will sustain Mr. Klein's objection.

Q You mentioned cooperation in your testimony, Sergeant Rawald. Did the defendant mention anything about it himself?

A Did he mention it? He indicated he was going to cooperate.

Q Is that the reason why --

MR. KLEIN: We are doing this indirectly and I object.

THE COURT: I will sustain it again. But as to the part that he indicated he was going to cocperate, I will permit that part, that portion.

Q Now, Mr. Klein elicited testimony that Harvey Rosenberg said he didn't want to meet Detective Copeland.

Do you recall that testimony?

A Harvey Rosenberg said Mr. Setter didn't want to meet --

Q I'm sorry, Mr. Setter didn't want to meet Detective Copeland.

Do you recall that?

A Yes, sir.

Q Why was it that the defendant didn't want to meet Detective Copeland?

MR. KLEIN: I will object to that.

THE COURT: Sustained.

MR. APPLEBY: All right.

Q Mr. Klein elicited some testimony about opening the cabinets and you only opened one of the five cabinets. You recall that?

A Yes, sir; one of the drawers of the file cabinet was opened.

Q What is your understanding of the legality of searching the house without a warrant?

MR. KLEIN: I will object to that, your Honor.

THE COURT: Sustained.

MR. APPLEBY: I think, your Honor, Mr. Klein --

THE COURT: You can argue it in your final argument, in your summation. You can argue at that time whatever you wish.

Q After you arrested the defendant, could you have gone down to the Eastern District of New York for a search warrant?

MR. KLEIN: This is argumentative and I suggested --

THE COURT: I will sustain it.

Don't answer that question.

MR. APPLEBY: No further questions, your Honor.

THE COURT: Mr. Klein, anything further?

MR. KLEIN: No, sir, your Honor.

THE COURT: Thank you. You may step down.

(The witness steps down from the witness stand and resumes his seat at counsel table as Case Investigator.)

THE COURT: We will take a ten minute adjournment.

The jury may go out.

Please do not discuss the case.

(The jury leaves the courtroom.)

(Whereupon a recess is taken.)

(Whereupon the proceedings resumed and the following takes place out of the presence of the jury.)

THE COURT: Ready to proceed?

MR. APPLEBY: Yes, your Honor.

I would like to call the chemist out of turn.

MR. APPLEBY: I would like to ask Sergeant Rawald one more question.

THE COURT: All right.

Bring in the jury.

(The jury enters the courtroom and the following takes place in open Court and in the presence of the jury.)

THE COURT: You may sit down, Sergeant.

W I L L I A M R A W A L D, previously sworn, resumes the stand and further testifies as follows:

THE COURT: Yes, Mr. Klein.

RECROSS EXAMINATION

BY MR. KLEIN:

Q Sergeant, I neglected to ask you something and thank you for coming back to the stand.

Sergeant, you are the Case Officer in this case?

A No, sir, not really. The Case Officer has since been transferred to another unit so, therefore, I am handling it because the officers involved from the beginning have been transferred.

Q You're coordinating and assisting the United States Attorney with the trial preparation of this case. Is that right?

A Yes, sir.

Q Have you discussed the testimony of the various officers and your testimony with him prior to your taking the stand or prior to any of them taking the stand?

A Yes, sir, we have discussed aspects of the case, yes.

MR. KLEIN: Thank you.

THE COURT: Anything further?

MR. APPLEBY: No, your Honor.

THE COURT: All right.

Thank you, Sergeant Rawald.

(The witness leaves the witness stand and resumes his seat at counsel table as the Case Officer.)

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MR. APPLEBY: All right.

I will call the next witness in front of the jury.

THE COURT: All right.

Bring in the jury?

MR. APPLEBY: Yes, your Honor.

THE COURT: Right.

(The jury enters the courtroom and the following takes place in open Court and in the presence of the jury.)

THE COURT: All right, we will proceed, Mr. Appleby.

MR. APPLEBY: Thank you.

The Government calls Frank Marrero.

THE COURT: Come up, please.

F R A N K M A R R E R O, sworn.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q Sir, by whom are you employed?

A By the New York City Police Department.

Q What is your position?

A I am assigned to the New York Drug Enforcement Task Force.

Q And how long have you been with the Task Force?

A Five years.

Q And are you one of the agents involved in the Joseph Setter case?

A Yes, I am.

Q Do you recognize the defendant Joseph Setter in the courtroom?

A Yes, I do.

Q Would you point him out to the members of the jury.

A Sitting to my extreme right.

THE COURT: Indicating the defendant.

Q Now, were you one of the arresting officers on July 3, 1975, of the defendant Setter?

A Yes, I was.

Q Where did that arrest take place?

A In front of his residence in Brooklyn.

Q Did there come a time when you went inside of Mr. Setter's residence?

A Yes, I did.

Q Did there come a time you went to his bedroom?

A I did.

Q Did there come a time when you -- when a box was given to you?

A Yes, it was.

Q What kind of a box was it?

A Shoe box.

Q Do you recall what kind of a shoe box?

A Thom McAn, I believe.

Q Who gave you that shoe box?

A Mr. Setter.

Q Were you in the presence of any other agent at the time?

A Yes, I was.

Q Was Sergeant Rawald in your presence at that time?

A Yes, he was.

Q Now, did you look inside of that box?

A Yes, I did.

Q What did you see inside the box?

A There was various quantities of narcotics, white powder, vials, pills.

Q Sir, I show you Government's 8, 9, 10, 11 and 12.

Now, let's take a look at Government's 9 first.

Do you -- excuse me, let's take a look at 8 first.

Do you recognize Government's 8?

A Yes, I do.

Q What do you recognize it to be?

A One of the items in the shoe box that was seized.

Q How do you identify it?

A My signature is on the sealing envelope and also on the item here.

Q On the item placed within the cellophane bag?

A Yes.

Q And on the seal outside?

A Yes.

Q Is it dated?

A Yes, sir, it's dated.

Q What is the date?

A July 3, 1975.

Q I show you Government Exhibit 9.

Do you recognize it?

A This is 7, I believe. 9 isn't here.

THE COURT: Go by the yellow tag.

A Yes, sir, I do. I'm sorry. I do recognize it.

Q What do you recognize it to be?

A Part of the evidence in the shoe box that was

given to me.

Q How do you recognize this item?

A Well, it's sealed and initialled by me, the item itself that's in the envelope, and also the labels that were put before sealing.

Q So your signature appears both on the item within the cellophane bag and on the seals outside of the bag?

A Yes, it does.

Q I show you Government's 10.

(Handed to the witness.)

Q Do you recognize it?

A Yes, I do.

Q What do you recognize it to be?

A Part of the narcotics that was in that shoe box.

Q All right.

And how do you recognize it?

A Also my name is on the item itself. It's on the seal of the bag. It's on the lock seal on the top before it's heat sealed.

Q And I show you Government's 11.

(Handed to the witness.)

Q Do you recognize it?

A I do.

Q What do you recognize it to be?

A Part of the same narcotics that was found in the shoe box.

Q How do you recognize it?

A Also my name is on the exhibit within the envelope, on the outside label itself and on the locks before we submitted it for analysis.

Q I show you Government's 12.

(Handed to the witness.)

Q Do you recognize it?

A Yes, I do.

Q What do you recognize it to be?

A The shoe box and another part of narcotics that was contained within.

Q The shoe box?

A Yes, within the shoe box.

Q How do you recognize it?

A My name was on the item itself, the narcotics in the shoe box, on the name of the envelope and on the top, the label that's put on the top.

Q Now, there are different bags within each of the exhibits we have discussed. Were they all within this one shoe box?

A Yes.

Q In separate bags?

A Yes, they were.

Q Now, after you received that shoe box, what did you do with it?

A I transported the shoe box to the Task Force office for processing with the other evidence.

Q And what occurred at the Task Force office?

A Excuse me?

Q What occurred at the Task Force office with respect to those exhibits?

A These exhibits were weighed, sealed, initialled and witnessed by another officer and then they are transported to the regional lab for analysis.

Q Who, to your knowledge, transported the exhibits from the vault to the chemist?

A I did.

Q And from the time that you took it from the vault until the time you gave it to the chemist it was in your custody?

A Yes, it was.

Q And it was placed in the vault at the chemist's laboratory?

A Yes, I imagine that's what they do there, yes.

Q Now, agent, were you one of the surveilling

officers on April 28, 1975?

A I was.

Q Where were you and what were you doing at that time?

A I was on surveillance along with Sergeant Rawald in the vicinity of Mr. Setter's house. It was the evening of the 28th.

Q Can you tell the members of the jury what you were able to observe on the surveillance team.

A I was able to observe Detective Copeland enter Mr. Setter's residence.

Q Did you see anything further?

A There came a time I saw him leave the house and then we met and the exhibit was purchased.

MR. KLEIN: I didn't hear the last part.

THE COURT: He said an exhibit was purchased.

MR. KLEIN: I ask that it be stricken, your Honor; not in the presence.

MR. APPLEBY: What ground?

MR. KLEIN: It's not in his presence.

THE COURT: I will strike it.

Motion to strike is granted.

That portion saying an ex-

hibit was purchased is stricken.

MR. APPLEBY: At this time, your Honor, the Government offers 8, 9, 10, 11 and 12.

MR. KLEIN: May I inquire as to those?

THE COURT: Yes.

This is voir dire by Mr. Klein.

VOIR DIRE EXAMINATION

BY MR. KLEIN:

Q Mr. Marrero, how long a period of time elapsed -- the items you have there, excuse me, are the items seized on July 3rd. Is that right?

A Yes.

Q And when was that turned in to the laboratory?

A I believe the same day, if I'm not mistaken.

MR. KLEIN: May I see those exhibits that the chemist had, the reports?

(Items referred to handed to Mr. Klein.)

Q Mr. Marrero, I show you -- excuse me --

THE COURT: You have to restrict these to these items, not to items he doesn't have.

MR. KLEIN: That's correct, sir.

Q We are talking about the content of the shoe box seized on May 3rd.

A July 3rd.

Q On July 3rd. Is that correct?

A Yes.

Q Do you have any notation in your records that you turned these contents over to the lab or the date you handed them over to the lab, rather?

Yes, we have receipts that we give back to the lab. I submit these exhibits with what the Government agency calls a DEA 7.

Q Let me show you something. Let me show you Exhibit 14, which is the laboratory report.

A Which 14 are we talking about? I don't have it in front of me.

Q 14 on the yellow --

A On the yellow?

THE COURT: 12.

MR. KLEIN: 12 is the corresponding number to 14?

THE COURT: Is that right?

THE WITNESS: He is mentioning Exhibit number 14, your Honor.

THE COURT: You have to go by the yellow

THE WITNESS: I don't have that one here.

MR. KLEIN: You see, your Honor, in the

middle it says, taken on July 3rd.

THE WITNESS: I have 7, 9 --

MR. KLEIN: This is the July 3rd one here, your Honor.

THE WITNESS: I have 8, 9, 10, 11 and 12, your Honor.

THE COURT: 14 and 10 I believe go together -- 14 and 12. 14 goes with this.

MR. KLEIN: I believe all of these reports refer to a seizure on July 3rd, your Honor.

THE WITNESS: Yes, they do.

THE COURT: 16 goes with 10. 18 goes with 8.

Do you have an 8 there?

THE WITNESS: Yes.

THE COURT: Do you want to take them?

MR. KLEIN: No, sir.

THE COURT: 17 goes with 9 and 15 goes with 11.

Q Let me ask you again, Officer Marrero, when did you turn those contents over to the laboratory?

A Well, seeing the report, it was on the 8th of July.

Q And when you say you turned them over the same day, July 3rd or the next day, that was incorrect,

wasn't it?

A Yes. I had said July 3rd. I said I believe it was July 3rd. I never mentioned it was the next day. Now that I see my reports and refresh my memory I would say it's the 8th.

Q The chemical laboratory got it on July 8th?

A Yes.

Q That's the receipt you referred to?

A It sure is.

Q Five days later?

A Yes.

MR. KLEIN: That's all the voir dire, your Honor.

THE COURT: Is that all?

MR. KLEIN: Yes.

MR. APPLEBY: I renew my application to introduce those exhibits in evidence.

MR. KLEIN: I certainly object because we now have an unexplained gap of five days here before --

THE COURT: Did you have custody of these for the five days?

THE WITNESS: No, your Honor. These exhibits are kept in a safe in our office.

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THE COURT: Who had custody for the five days?

THE WITNESS: They remained in a vault we have in the office.

THE COURT: Who put them in the vault?

THE WITNESS: I did. And on the 8th when I turned them over to the lab, one of the superior officers who has custody for the safe opens it.

THE COURT: He opens it up?

THE WITNESS: Yes. I can't get into it. All I can do is drop evidence in. I don't have access to it.

BY MR. KLEIN:

Q How many people have access to it?

A I would say maybe ten people; all superior officers

THE COURT: Now, from the time you put those items in the vault at the DEA until you retrieved them were any of the seals broken?

A No.

Q Could any of the seals have been taken off and put back on?

A Unless I did it, sir. My signature is on the top.

Q Couldn't you have -- your signature is on

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the top. Is there a date, too?

A Yes.

Q You could have put an earlier date, couldn't you?

A Excuse me?

Q You could have put an earlier date?

THE COURT: Tell us the date on the seal.

THE WITNESS: July 3rd.

THE COURT: That's the seal on the top?

THE WITNESS: That's the seal on the top.

THE COURT: And that seal has never been broken?

THE WITNESS: No, it hasn't.

THE COURT: Items received in evidence on behalf of the Government.

THE CLERK: Government's Exhibit number 8, 9, 10, 11 and 12, previously marked for identification, received in evidence.

(So marked.)

THE COURT: Anything further, Mr. Appleby?

MR. APPLEBY: I have no further questions.

MR. KLEIN: I didn't cross-examine him

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yet. That was only a voir dire.

THE COURT: That was voir dire.

All right, you may go right ahead.

CROSS EXAMINATION

BY MR. KLEIN:

Q Could you have placed those envelopes in the safe without a date on it and then on the 6th when you took them out could you have then put a seal on it and dated the seal the 3rd?

A No.

Q I mean, it's possible, isn't it?

A Anything is possible, counselor; but that isn't the procedure.

Q But it could have been done that way?

A I imagine it could have.

Q Right.

Were you on the surveilling team when the arrest was made on July 3rd?

A I was.

Q You were?

A I was, yes.

Q Did you carry a gun?

A I do.

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Q .38?

A Yes.

Q And did you have your gun out?

A No, I didn't.

Q Did the other officers have their guns out?

A I don't recall. They may have.

Q How many officers were there?

A Roughly five. I don't remember offhand. I would have to see one of the reports.

Q How about Sergeant Rawald? Was he there?

A Yes, he was.

Q How about Agent Ebert?

A He was.

Q Do you know -- do you know the purpose you were there for?

A Yes.

Q To arrest a person accused of making a sale -- two sales of narcotics?

A Correct.

Q You didn't draw your gun?

A No.

Q And you have no recollection as to whether any of the other officers drew their guns?

A I don't recall whether they did or not. I can't

speak for them.

Q Who placed him under arrest? Who placed Mr. Setter under arrest?

A I believe it was Sergeant Rawald. He was the first one there.

Q What did he say to him?

A Excuse me?

Q What did he say?

A I didn't overhear what he said, but he was placed under arrest. He may have said, "You're under arrest." I don't know.

Q This was outside in the driveway?

A Yes.

Q You were in the driveway, also?

A No, I was across the street. I was approaching the house.

Q Did you see anybody read him rights there or not, or later?

A I recall Sergeant Rawald advising him of his rights

Q Outside the house?

A Yes.

Q Did you hear Sergeant Rawald say to him, "You got any narcotics or other drugs, you should surrender it, and I suggest you surrender it to us"?

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A There was a conversation like that inside. I don't know if that's the way it went. I don't recall what the conversation was.

Q Did you do any searching in the house? Did you search any drawers?

A Not at all.

Q Did any of the other officers search any drawers or look in the cushions in the house?

A No, they did not.

Q Was everybody in the same room at the same time when the closet was opened?

A Excuse me, sir?

Q Was everybody in the same room at the same time when the closet was opened or not?

A I recall there was a couple of us there. I don't know if all of us were there, but we were standing pretty close.

Q Was the closet locked or unlocked?

A The closet I believe it was locked.

Q And did Mr. Setter then come and take the key off his key ring and open it?

A No, it wasn't locked with a key, the closet door. He opened it without using a key.

Q How about the metal cabinet that was in

there, the file cabinet?

A Mr. Setter used a key to get into that.

Q Did you go in and search and look into the cabinet to see what was there?

A I did not.

Q Was Mr. Setter under arrest at the time?

A He was placed under arrest, yes.

Q Outside before he got in the house?

A Yes.

Q Do you know the purpose of going into the house?

A Excuse me?

Q Do you know the purpose of going into the house?

A To begin with, he wasn't thoroughly searched and he didn't want any commotion in front of his house and we were willing to oblige as far as that was concerned.

Q He wasn't thoroughly searched outside?

A No.

Q What did you do outside in the search?

A Excuse me?

Q What kind of search did you do outside?

A He was placed under arrest and we walked him back to his house.

Q Did you search him at all outside?

A He may have been lightly patted. I didn't pat him down.

Q Do you recall independently whether he was searched outside?

A I can't recall whether he was searched outside.

Q Was he searched inside?

A He was patted down to see if he had a weapon or.

Q Inside?

A Excuse me?

Q This is inside now?

A I imagine it was. I'm trying to recall the incident.

Q This is what you recall or what you imagine?

A I am trying to recall.

It's what I recall.

Q You're saying he wasn't searched outside, he was patted down inside and that was the purpose for going inside to search him?

A Yes.

Q What about his cat?

A What about his cat?

Q Did you ever see a cat there?

A I don't recall seeing a cat.

Q Did he tell you he wanted to go back in -- after he was arrested did he tell you he wanted to go back and feed his cat?

A He mentioned something like that inside, he wanted to feed the cat and call his girlfriend.

Q This was after he was inside?

A Yes, while he was inside.

MR. KLEIN: Just a moment.

(Mr. Klein confers with the defendant out of the hearing of the Court Reporter.)

Q Who did Mr. Setter hand the box to?

A Excuse me?

Q Who did Mr. Setter hand the box to?

A He handed it to me.

Q Did anybody say, "If you don't open this door of this file cabinet we'll bust this fucking place down," or something similar to that?

A Absolutely not.

Q Did you go -- do you know whether he was handcuffed or not any part of the time?

A When we walked him out he was cuffed.

Q He was cuffed?

A Yes.

Q Anything over the cuffs?

A A jacket, I imagine.

Q What day was this?

A Excuse me?

Q What day was this?

A July 3rd.

Q Was he wearing a short sleeve shirt?

A I believe he was.

Q Were you going in the car with Agent Ebert and transporting him downtown?

A No, I did not.

MR. KLEIN: I have no further questions, your Honor.

THE COURT: Redirect, Mr. Appleby.

MR. APPLEBY: One question.

REDIRECT EXAMINATION

BY MR. APPLEBY:

Q When Sergeant Rawald was talking to the defendant outside did you hear all of that conversation?

A No, I did not.

MR. APPLEBY: No further questions, your Honor.

MR. KLEIN: Just a moment.

RECROSS EXAMINATION

BY MR. KLEIN:

Q How long were you on surveillance that morning before Mr. Setter came out?

A Roughly it was a little over an hour.

Q Did you see a young lady leave the house before Mr. Setter did?

A Don't recall.

Q Were you looking at the house all the time?

A We were on surveillance and we changed locations so we don't cause any disturbance in the neighborhood. At the time if there was a young lady leaving I may not have been looking at the house.

Q What were you looking at?

A May have been in a different area being advised by someone else, a surveilling officer in the area may have been looking at the house.

Q I thought all six of you were at the house on surveillance so you can make an arrest when he came out.

A Yes, but all six of us don't look at the house at the same time for the same period of time and I just don't remember a lady leaving that house.

THE COURT: Anything further from this witness?

MR. KLEIN: No.

EXCERPTS FROM TRIAL TESTIMONY - MICHAEL GOLUB

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MR. APPLEBY: No, your Honor.

THE COURT: Thank you.

You're excused.

MR. APPLEBY: The Government calls Michael Golub.

M I C H A E L G O L U B, sworn.

THE CLERK: State and spell your name.

THE WITNESS: Police Officer Michael Golub G-o-l-u-b, Sheild 13703, New York Drug Enforcement Task Force.

THE CLERK: Speak up so the last juror can hear you.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q By whom are you employed, sir?

A New York City Police Department.

Q How long have you been so employed?

A A little over seven years.

Q You are a police officer?

A Yes, sir, I am.

Q Do you work in an undercover capacity?

A Yes, I do.

Q How long have you been working in an undercover capacity?

A Approximately two, two and-a-half years.

Q Now, you're one of the agents involved in the Setter case?

A Yes, sir.

Q Do you recognize the defendant Setter in the courtroom?

A Yes, I do.

Q Would you point him out to the members of the jury?

A Sitting next to his attorney.

THE COURT: Indicating the defendant.

Q Now, did there come a time you were on a surveillance team on April 17, 1975?

A Yes, sir.

Q Where were you on surveillance?

A In the vicinity of Mr. Setter's residence on Glenwood Road.

Q Do you recall what time that was?

A Approximately 4:00 o'clock, in that vicinity.

Q You were with another officer and agents?

A Yes, sir, I was with Detective Sierra.

Q Officer, would you tell the members of the jury what you were able to observe that day?

A Yes, sir.

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At approximately 4:10 P.M. I observed a late model Pontiac parked in front of Mr. Setter's residence. At this time I observed Mr. Setter exit this residence -- exit the auto carrying a green paper bag and enter his residence. Approximately 20 minutes later I observed the SET.

Q Who is the SET? His name has been mentioned.

A Mr. Rosenberg.

Q Go ahead.

A Enter Mr. Setter's residence.

Approximately 20 minutes after that I observed Mr. Rosenberg exit Mr. Setter's residence and walk towards one of our cars.

MR. KLEIN: Excuse me, may we approach the side bar for a minute?

THE COURT: Yes. Come up.

(The following takes place at side bar out of the hearing of the jury.)

MR. KLEIN: I don't seem to have any 3500 material on this fellow.

MR. APPLEBY: I gave you the entire police reports. Mr. Golubs name is mentioned in the report. There is no Grand Jury testimony.

MR. KLEIN: How about daily reports from him like Copeland made?

MR. APPLEBY: In the DEA6 you will see his name mentioned and his testimony that he gave is mentioned in there.

MR. KLEIN: It's mentioned in someone else's report?

MR. APPLEBY: He is not the author of the report, but his testimony is contained within that.

MR. KLEIN: If you give me a representation that there is no 3500 statement --

MR. APPLEBY: No.

MR. KLEIN: I thought he overlooked something.

THE COURT: All right.

(The following takes place in open Court and in the presence of the jury.)

MR. APPLEBY: I wonder if you might read the last portion of the testimony.

(The Court Reporter reads the requested portion.)

Q Did you observe anything further on April

17th?

A Yes, sir. Approximately five minutes -- approximately about five minutes later I observed Mr. Rosenberg again enter Mr. Setter's residence. I believe Mr. Rosenberg remained there for approximately -- I believe it was approximately 20 to 30 minutes, at which time Mr. Rosenberg again exited Mr. Setter's residence.

Almost simultaneously as Mr. Rosenberg exited, as Mr. Rosenberg was exiting the residence, I observed an unknown male and unknown female enter Mr. Setter's residence.

I remained on surveillance. At which time about half an hour, 25 minutes, 20 minutes later, this unknown male, unknown female, exited Mr. Setter's residence.

About 20 minutes after that, a half an hour after that Mr. Setter exited his residence, at which time we stopped surveillance.

Q Do you now know who the two individuals who entered Mr. Setter's residence after Rosenberg left the second time were?

A Not to my knowledge, not at this time.

Q Were the license plates traced?

A Yes, they were.

Q The name Edward Zaremski ring a bell?

A Yes.

Q Officer Golub, were you on duty on April 28, 1975, as well?

A Yes, sir, I was.

Q Can you tell the members of the jury where you were and what occurred on that date.

A On that date I was again on surveillance with my brother officers in the vicinity of Mr. Setter's residence on --

Q What time was this approximately?

A This was approximately 10:00 P.M. at night, in that vicinity, approximately 10:00 P.M..

And approximately 20 minutes to eleven I -- well, 20 minutes to eleven I followed Detective Copeland a few blocks away from the area of Mr. Setter, at which time Detective Copeland showed me and --

MR. KLEIN: I will object to it as hearsay now.

THE COURT: I will sustain it.

Don't go any further as to that.

THE WITNESS: At this time I conducted a field test on an exhibit.

MR. KLEIN: I will object. This is so

tied in with hearsay --

THE COURT: I think if he is the one who conducted the field test, I think that should be part of what we receive.

Detective Copeland had a package?

THE WITNESS: Yes, sir.

THE COURT: And you conducted a field test on it?

THE WITNESS: Yes, sir.

THE COURT: I think we should receive that because that's part of this case, this particular case.

Q Please continue.

A At this time I conducted a field test on the exhibit that Detective Copeland had handed me with positive results.

Q For what?

A For cocaine.

Q Continue, please.

A The exhibit was -- I then gave the exhibit back to Detective Copeland. At which time myself, Detective Copeland and I believe Detective Sierra proceeded back to the New York Drug Enforcement Task Force office where

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the evidence was signed, sealed and weighed.

Q In your presence?

A In my presence, yes, sir.

At this signing and sealing and weighing of the evidence I and Detective Sierra placed the evidence in the New York Drug Enforcement safe.

Q Sir, I show you Government's 2 and 3 for identification.

(Handed to the witness.)

Q Do you recognize Government's 2 and 3?

A Yes, I do.

Q What do you recognize it to be?

A I recognize Government's Exhibit --

Q I'm sorry, Government's 3 and 4 for identification. I was looking at the wrong label.

A I recognize Government's Exhibit 3 as the New York Drug Enforcement Task Force 3 and CT-750113.

Q That's the case number?

A Yes, our case number and that's the exhibit I received.

And also Government Exhibit number 4 as the same exhibit I received.

Q Now, these were the exhibits placed in the safe?

A Yes, sir.

MR. APPLEBY: I have no further questions, your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. KLEIN:

Q Officer Colub, did you place the exhibits on the same day as you received them?

A Yes, sir.

Q Did you deliver these to the chemical laboratory at any time?

A No, sir, I did not.

Q Is that a combination lock in the safe?

A Yes, sir.

Q Do you know the combination?

A No, sir.

Q Who was the other man, Detective Sierra?

A Yes, sir.

Q He doesn't have the combination, does he?

A No, sir.

Q Your testimony is you placed it in the safe and left the safe open or did you give it to somebody else?

A No, on the top of the safe there is a chute where

you place the exhibit in and you hear it fall to the bottom and it's closed. The safe remains closed at this time.

Q When you put it in the safe it remains closed?

A Yes, sir. I don't open it, sir.

Q Would there be any point in giving these exhibits, or any exhibits, to one of your superior officers who have access to the safe so he can put it in the safe?

A No, not at all. We have a chute on the top of the safe where you can put it in.

Q Do you know the preceding officer who just testified here, Officer Marrero?

A Yes, I do.

Q Is he familiar with the chute?

A On top of the safe?

Q Yes.

A I would think so.

Q If you were asked whether you acted in an undercover capacity --

A Yes.

Q -- you didn't act in an undercover capacity in this case, did you?

A In this case, no, sir.

Q What is a DEA6?

A A DEA6 is a report of investigation.

Q Right.

And isn't this supposed to be made by the investigating officer coincidentally with the date, in other words, if you had an investigation on today's day, you would make it today or tomorrow morning as close as possible to today?

A At the earliest time possible.

Q Did you make any DEA-6's in connection with your activities in this case?

A Personally?

Q Yes.

A No.

Q This test you performed, you performed it out in the street?

A Yes, sir, I did.

Q Were you carrying a vial or anything with you?

A A vial -- not a vial, no, sir.

Q A vial?

A No. The only thing I had with me, if you want to call it a vial, a tester.

Q A little plastic container?

A It's a vial, but very small.

Q And was this conducted out in the street?

A Yes, sir, it was; in my auto.

Q What time?

A Approximately five minutes or maybe even less after Detective Copeland exited the residence.

Q What time was that?

A I would say approximately -- I believe he exited about 10:40 P.M., and this was about 10:45 P.M. and maybe before.

Q Are you color blind?

A Am I who?

Q Color blind.

A No.

Q Ever been tested for color blind?

A Yes, sir.

Q Are you color blind?

A No, sir.

Q What color came out in the test?

A Blue.

Q Do you know what was in the solution to your knowledge?

A Not as an expert, I wouldn't know, no.

Q Is that a specific positive test or it just indicates the probability or possibility of it maybe being cocaine?

A I believe it indicates the probability. I don't --

Q Then afterwards it goes to a laboratory and they give it the full test?

A Yes.

Q Do you know if there have ever been an occasion where you applied that test, it came out blue, but the laboratory later on checked it and found it wasn't cocaine, it was some other alkaloid substance? Do you know of a situation in your knowledge or somebody else --

A Not personally, but I have heard of it.

Q And in those instances where a person is arrested because of a possession or sale of that particular substance in which a field test indicated the possibility or probability of the presence of cocaine and later on was found not to be cocaine, that person would have been falsely arrested, wouldn't he?

MR. APPLEBY: That's not true, your Honor; that's not the law.

THE COURT: That's not the case here. I will sustain the objection

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Q Do I understand that you sometimes or you make arrests in -- you make arrests based on possibility or probability of a field test?

A No, sir; incorrect.

Q Were you there on July 3rd when Mr. Setter was arrested?

A No, sir, I was not.

Q Did you see any -- on the 28th when Mr. Copeland was in the house in the evening around 12:00 o'clock --

A Yes, sir.

Q -- do you recall if you saw anybody come out of the house afterwards?

A No, sir, I didn't have a surveillance of the house where I could actually see the residence.

Q Did you make a field test on the product of the 28th?

A On Detective Copeland?

Q Yes.

A Yes, sir, I did.

Q Did you make on on the 17th on the one on Mr. Rosenberg?

A No, sir, I did not.

Q That man that you testified to on the 17th,

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the man who later came up in that car, was it a Pontiac?

A I believe so, yes, sir.

Q And you saw them arrive and leave?

A That's correct.

Q They arrived immediately after Mr. Rosenberg left the second time?

A That's correct.

Q When I say left, I don't mean only the house, I mean left with Mr. Copeland.

A No, I'm talking about after he left the residence.

Q He left the residence and went to Mr. Copeland's car and they left?

A Excuse me?

Q They didn't leave then?

A No, sir.

Q Mr. Rosenberg didn't leave in Mr. Copeland's car?

A I thought you meant this man.

Q No. I understand the second time Mr. Rosenberg went into Mr. Setter's house, he came out again and they went into Detective Copeland's car and then they took off?

A I couldn't --

THE COURT: This is on the 17th?

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MR. KLEIN: Yes, sir.

THE COURT: Were you there?

THE WITNESS: Yes, sir, I was. I was observing the residence. I observed a male and female enter the apartment. I wasn't observing the car.

Q How long after Mr. Rosenberg left did you see this man and woman come in?

A Almost immediately, very shortly.

Q It was momentarily, right?

A Yes, sir.

Q How long did they stay in?

A Around 25 minutes.

Q Then they left?

A Yes, sir.

Q Did you follow them?

A I couldn't follow them, no, sir.

Q Do you know of anybody there?

A I do not know.

Q Do you know if Mr. Zaremski, the owner of the car, do you know if that was him?

A No, sir, I do not.

Q Do you know if Mr. Zaremski has a narcotic record?

A-281



A No, sir, I do not.

Q Did you see anybody leave the house on the other occasion when Mr. Copeland was inside?

A No, sir, I could not observe the house on that occasion.

MR. KLEIN: Thank you.

THE COURT: All right.

MR. APPLEBY: No redirect, your Honor.

THE COURT: Let me ask you, did you put those envelopes into the safe?

THE WITNESS: I did, yes.

THE COURT: Did you seal them?

THE WITNESS: No. Detective Copeland and Police Officer Ryan I believe sealed them.

MR. APPLEBY: Officer Ryan will be testifying next, your Honor.

THE COURT: All right.

Thank you, thank you.

You're excused.

(The witness is excused.)

MR. APPLEBY: The Government calls John Ryan.

J O H N R Y A N, sworn.

THE CLERK: State and spell your name

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for the Court Reporter.

THE WITNESS: Police Officer John Ryan, Shield number 30535, R-y-a-n.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q Sir, you're employed by the New York City Police Department. Is that correct?

A That's correct.

Q And how many years have you been so employed?

A Nine years and eleven months, sir.

Q And you were assigned to the Task Force. Is that correct?

A Yes, sir.

Q And, as a matter of fact, you were the case agent or one of the case agents involved in the Joseph Setter case?

A That's correct.

Q You recognize the defendant Joseph Setter in the courtroom?

A Yes, sir, I do.

Q Point him out, please.

A The gentleman sitting in the brown striped suit sitting next to counsel.

THE COURT: Indicating the defendant.

A-2f3



Q Now, first, sir, I would like to show you Government's 3 and 4 for identification and ask you, first of all, whether you recognize Government's 3.

(Handed to the witness.)

A Yes, sir, I do.

Q What do you recognize it to be?

A I recognize it to be the exhibit and my signature affixed to it as the sealing officer.

Q When did you first see that exhibit? Where did you first see that exhibit and what did you do with it?

A I took it and I believe from the officer who had purchased it.

Q Right.

Did there come a time you went to the vault with respect to this exhibit?

A I believe so, sir.

Q And where is the vault located?

A The vault is located in the Task Force office.

Q And when you got it from the vault what did you do with it?

A I didn't take it from the vault, sir.

Q You didn't take this exhibit from the vault?

A No, not from the vault, I don't believe so, unless

you are referring when I received it to bring it to the analyst.

Q Yes. That's what I mean.

Can you tell the members of the jury how that occurred?

A I believe it was on the date after the purchase. That would be April 29, 1975. I had the exhibit removed from the vault by one of the superiors in the office. I signed for it in the book and I brought it to the Drug Enforcement Administration laboratory for analysis.

Q And they put it in the vault presumably?

A Yes. I surrendered it to the custodian of evidence.

Q Incidentally, is your signature here?

A Yes.

Q Where?

A On the sealing sticker as evidence. And my signature is also on the drug tag at the top.

Q When did you sign these stickers?

A On April 28, 1975.

Q Now, with respect to Government's Exhibit 4, could you tell us when you first saw that exhibit and what you did with it and how you recognized it?

A My signature is also affixed to the evidence tag on the face of the evidence envelope and also my initials

are on the tag on the seal of the envelope.

Q What did you do with respect to Government's 4?

A This, also, I received at the same time I removed Exhibit number 3 from the safe.

Q And brought it where?

A Also brought by myself to the laboratory for analysis and, at which time, I surrendered it to the custodian at the laboratory for evidence.

MR. APPLEBY: I offer these in evidence, your Honor.

THE COURT: Would you like a voir dire?

MR. KLEIN: I would like to look at this, your Honor.

THE COURT: 3 is 19 and 4 is 20.

MR. KLEIN: I have no questions, your Honor.

THE COURT: He is offering it in evidence, 3 and 4.

MR. KLEIN: Offering it in evidence now?

THE COURT: That's what he is doing.

MR. KLEIN: No objection.

THE COURT: All right.

Received in evidence on

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behalf of the Government, marked 3 and 4 in evidence.

THE CLERK: Government's Exhibit number 3 and 4, previously marked for identification, received in evidence.

(So marked.)

THE COURT: Cross-examination.

MR. APPLEBY: No, your Honor. I have a number of other questions of the officer.

THE COURT: I'm sorry.

BY MR. APPLEBY:

Q Officer Ryan, do you know one Harvey Rosenberg?

A Yes, I do.

Q Who is Harvey Rosenberg?

A He was a confidential informer.

Q And you worked with Harvey Rosenberg. Is that correct?

A That's correct, sir.

Q Now, did there come a time you met Harvey Rosenberg on April 17, 1975?

A Yes, sir.

Q Did you meet him at the New York Joint Task Force office?

A Yes, sir, I did.

Q Would you tell the members of the jury what happened on that date at the Task Force office.

A On that afternoon in the Task Force office Mr. Rosenberg met with myself and my superior, Sergeant Rawald. At that time in the afternoon it was discussed what --

MR. KLEIN: I would respectfully object to this as hearsay and outside the presence of the defendant.

THE COURT: Sustained.

Q Officer, just tell us not what other people said, but what was done in terms of actions.

What was done?

THE WITNESS: That afternoon I wired Mr. Rosenberg with a body transmitting device.

Q Continue, please.

A Which my partner, Special Agent Ebert, and myself tested to see if the device was operational.

Q Incidentally, Officer, do you have any expertise in electronics?

A A certain amount, yes.

Q Would you tell the members of the jury what that expertise is.

A In June of 1973, the Police Department conducted a course in the New York City Police Department in photo and electronic surveillance. The course consisted of photography in its aspect and also the aspect of electronics used for surveillance, wiretapping and bugging of individuals and places.

Q All right.

Now, we have had a little testimony on what a Kel set is. I wonder if you can explain to us in a little more detail exactly how a Kel set works.

A A Kel set is composed of several parts. The main part of a Kel set is contained in an attache case, the same as any attache case an individual may carry papers in.

Contained inside the set itself is a unit comprised of a tape recorder, a receiving and monitoring device.

Accompanying that set is the body transmitting device itself. This is usually contained and in this particular case was contained in a large wide elastic band very similar to a cumberbund which had several pockets sewn into it.

In one of the pockets the transmitting device itself was contained, to which was attached the micro-

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phone and the aerial for the transmitter itself.

Also contained in the belt in one of the other pouches were batteries which supplied power for the transmission of the device itself, very similar to batteries used in a portable radio.

The device is usually worn around the waist, although it can be worn in other parts of the body and can be placed in a pocket or something similar to that. Usually the device is taped -- the microphone itself is usually taped to the individual's body, some part of his body where it will be most readily available to pick up individuals from the individual who wears it as well as the individual speaking.

Q How do you monitor the conversation? How is that arranged?

A The unit transmits to the -- the unit the individual wears, the Kel itself, transmits to the device which is contained inside the attache case.

The unit can be used without using a tape recorder if it's necessary not to tape whatever is said.

In this particular case, we used a cassette, which recorded what was said.

Q Now, Officer, you have recorded telephone conversations between cooperating individuals and target

A-290



defendants. Is that correct?

A Yes, sir.

Q Are those recordings pretty good?

A Yes.

Q How would you compare the quality of a recording ordinarily with the quality of a Kel set recording in the ordinary circumstances?

A First of all, you're speaking of two entirely different things. The recording that would be done on a telephone would be very similar to a recording which can be done here where the device is placed in front of you and you speak directly in it. What you would be speaking into would be the telephone and the other individual would be as close as his telephone and, therefore, your reception is rather good.

You run into quite a few problems in the use of the body Kel itself in the fact that since the microphone and the unit itself must be concealed so that the individual who is wearing it won't be observed wearing it, it has to be worn under clothing.

Naturally a person who is wearing the unit itself besides breathing is also moving. So the body movement with the microphone itself concealed beneath clothing gives a certain amount of distortion when you make it

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in the fact that you see quite -- you hear quite a bit of rustling of the clothes rubbing across the microphone itself.

Q What other problems with respect to the quality of the recording can you find?

A One of the main problems you may run into is the fact of the distance the recording unit is from the transmitting unit.

You also have to be concerned with the direction that the person is wearing the unit is standing in direction to the receiving unit and also the type of a premises that the individual who is wearing the unit is inside.

If he would be inside a large commercial building which contains quite a sizable amount of steel and various types of electronics cables and machinery and things like that, you pick up a certain amount of distortion and sometimes quite a bit of distortion and maybe sometimes no transmission whatsoever.

In this particular incident also, you have to be concerned with the other electronic equipment that is in the area where you are using it. Should you happen to be using it in an area where there is a large amount of overhead power lines which conduct electricity, also

if there are different types of radios being used in the area, for instance, if someone in the area would be happening to be using a ham radio set or CB set, or also if police vehicles in the area would be using their two-way radios, this also provides a certain amount of distortion.

Q There are other problems as well?

A Yes.

Q Now, let's get down specifically to April 17, 1975. There came a time you wired up Mr. Rosenberg. Is that correct?

A That's correct, sir.

Q And there came a time you left with Mr. Rosenberg towards Mr. Setter's residence?

A I did not leave with Mr. Rosenberg. I left with --

Q You left with someone else?

A Yes.

Q And you were in another car with other officers?

A With another officer, yes.

Q And you had a transmitting device with you?

A No, Mr. Rosenberg was wearing the transmitting device. I had the receiving unit with me.

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Q Sorry, the receiving unit.

Now, tell us what occurred after you arrived at Mr. Setter's residence.

A I was the driver of the vehicle that day and we positioned ourselves in what was the most reasonable and unobvious location we could obviously find and yet still be near Mr. Setter's residence on Glenwood Road.

We parked our car in a parking lot and we obtained the power for the set itself by plugging it into the lighter in the vehicle in which we were riding.

This is a Government vehicle which is also contained in a two-way radio communication.

The vehicle was left on because we had left the engine running because at the time we had no idea how long we would be using any of the units, our radio as well as this particular unit.

Q Did there come a time Mr. Rosenberg entered Mr. Setter's residence?

A There was a time, yes, sir.

Q And was the transmitter activated at that time?

A Yes, it was.

Q And can you tell us what occurred then.

A At the time that Mr. Rosenberg approached and

entered Mr. Setter's residence, the body transmitter was activated by Mr. Rosenberg.

At that time I was monitoring the receiving unit and began to receive transmissions from the unit that Mr. Rosenberg was wearing. And at this time I continued to monitor that as well as record it.

Q Did there come a time when Mr. Rosenberg exited Mr. Setter's residence?

A Yes, sir.

Q What happened then?

A At the time that Mr. Rosenberg left Mr. Setter's residence, he communicated with me by the body Kel device he was wearing because I had previously instructed him to do so.

I observed Mr. Rosenberg enter the undercover vehicle in which Detective Copeland was waiting for him.

For a short time, maybe a matter of a minute or so when Mr. Rosenberg entered the undercover vehicle, I was still able to monitor Mr. Rosenberg's conversation with Detective Copeland.

A short time after that it was apparent that Mr. Rosenberg had somehow, by movement, disconnected the transmitting part of the Kel set he was wearing and we ceased to receive on the unit.

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At this time Special Agent Ebert disconnected the recording unit and we no longer made a tape recording of it.

However, I continued to monitor the unit in case we should again receive transmission from the body Kel unit; at which time we would have reactivated the recording device itself.

Q All right.

Now, did there come a time when you went back to the New York Joint Task Force office?

A Yes, that's correct.

Q And when Mr. Rosenberg went back as well?

A Yes, that's correct.

Q Did I basically cover what happened on that date as far as you're concerned?

A Yes, I would say so.

Q And you took off the Kel set?

A Yes.

Q And you had a tape as a result of this transmission?

A Yes, sir, that's correct, sir.

Q And it was on a cassette type tape?

A Yes, sir, that's correct.

MR. APPLEBY: I would ask this be marked

as the next Government Exhibit for identification.

THE CLERK: One cassette tape marked Government Exhibit number 21 for identification.

Q Officer Ryan, I ask you to look at Government's 21 for identification and ask you whether you recognize it.

(Handed to the witness.)

A Yes, sir, I do.

Q What do you recognize it to be?

A I recognize it to be the original recording of Mr. Rosenberg's conversation with Mr. Setter which I have monitored and recorded on that date.

Q How do you recognize it?

A My initials are affixed to the front of it.

Q Now, did there come a time -- did there come a time when you played Government 21 on the tape recorder and heard it?

A Yes, sir, I heard it.

Q You have heard it many times. Is that correct?

A Yes, sir.

Q Isn't it a fact that -- well, did you have any part in the transmission of that -- let me strike that.

When you heard the tape after the monitoring of it, was it a fair and accurate representation of the conversation that was held between Mr. Setter and Mr. Rosenberg?

A Yes, sir.

Q Did there come a time when you saw a transcript of the tape?

A Yes, sir.

Q Was the transcript a fair and accurate representation of what you had monitored near Mr Setter's residence?

A Yes, it was.

MR. APPLEBY: I would ask this transcript be marked the next Government exhibit for identification.

THE CLERK: Six page transcript marked Government Exhibit number 22 for identification.

(So marked.)

Q Officer Ryan, I show you Government's 22 for identification and ask you whether you recognize it.

(Handed to the witness.)

A Yes, I do.

Q What do you recognize it to be?

A To be a transcript of the recorded conversation

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between Mr. Setter and Mr. Rosenberg.

Q And in the transcript there is a reference to SCT. What is that?

A That is a designation indicating Mr. Rosenberg.

MR. APPLEBY: I offer Government's 21 and 22 in evidence, your Honor.

MR. KLEIN: A short voir dire on it, your Honor?

THE COURT: Surely.

The voir dire is as to the tape and the transcript.

MR. KLEIN: Yes, sir. I wasn't going to cross-examine, just on the voir dire.

THE COURT: Surely.

VOIR DIRE EXAMINATION

BY MR. KLEIN:

Q Sir, Mr. Ryan, are there occasions when you have distortions in the tape because of outside noises?

A I would say so, sir, yes.

Q If you're in a restaurant and you hear the dishes?

A Yes, sir.

Q Or you're near a radiator you will hear the

A-299



steam near the radiator?

A Yes, sir.

Q Or a radio going in a room, or music playing?

A Yes, you can hear music in the background.

Q And there are many reasons why there are distortions. Is that right?

A If you mean by distortions background noise, which is discernible noise of a specific origin, yes.

Q Sometimes that blocks out what you're attempting to transmit, just overrides it, sometimes it obscures a portion of it and distorts. Is that correct?

A On certain types of equipment for minitoring or transcribing such a tape should be, correct.

Q Would that be correct with a Kel transmitter?

A It might be reasonable to point out to you that with certain types of instruments that can be used to make -- to make a recording or to transcribe from a recording, that certain sensitive electronic equipment can be used to squelch background noise and raise the particular conversation that you may want.

Q Was any of that sophisticated equipment used in this particular case?

A To transcribe the tape?

A-300



Q No. to take it down; not to transcribe it.

A I wasn't using -- speaking of using that type of equipment to receive.

Q I was talking about receiving and you were talking about transcribing?

A I thought your question was indicating transcription.

Q On receiving, it was an ordinary Kel transmitter. Isn't that right?

A Yes, sir.

Q Does not a Kel transmitter have an off and on button?

A Yes, sir.

Q Isn't it possible for the person wearing it to cut out what he doesn't want?

A Yes, sir.

Q And the person in the back-up unit sitting in the car listening to it, doesn't he have an off and on button that he can cut out the audio button?

A The unit would have to be shut off.

Q You can do that?

A You can shut the unit off, yes, sir.

Q And there came a time in this conversation where there was a gap. Is that correct?

A-301



A I'm sorry, sir?

Q A gap where it stopped recording where nothing was being transmitted it stops recording?

A Yes, sir. Shortly after Mr. Rosenberg entered, Detective Copeland's auto.

Q So that the conversation that took place at that moment between Detective Copeland and the informant Rosenberg was not transcribed on the cassette?

A A portion of it was.

Q And a portion was not?

A I assume so.

Q And when you say nevertheless even though it wasn't, you continued to monitor. Isn't that so?

A Yes, sir.

Q I understand in addition to having the cassette going and picking up what was being said and being transmitted, you also tuned in your car radio to a particular beam, wave length, and picked it up?

A No, sir.

Q If it wasn't coming through, how could you monitor it?

A I don't think you understand the construction of the unit itself.

The unit is a twofold unit. It contains a tape

A-302



recorder -- cassette recorder and also contained with that is a monitoring unit.

Q Like a speaker?

A In other words, the tape recording unit may be shut off and not record something and yet you can still hear what the individual is saying over the set itself.

Q Right.

Now, at this particular point when the informant entered Copeland's car, you lost the contact on the tape, on the cassette?

A That's correct.

Q But you say -- did you hear then the other portion is audible, you could hear it yourself, is that right, just the same if you turn a radio on? Doesn't it come across that you can hear it while it's being transcribed on the cassette?

A The entire body unit Mr. Rosenberg was wearing ceased to transmit. And if I recall correctly, when we returned to the Task Force office that day, that the microphone itself was pulled out of the transmitting device he was wearing, if I recall correctly.

This also is one of the inherent problems of using that particular type of unit.

Q That could easily be done by Mr. Rosenberg,

he could pull it out?

A Possible it may have been done. It's doubtful because it's much easier to shut the unit off with a toggle switch rather than disconnect the microphone.

Q That's another way of doing it?

A Yes.

Q If he shut the microphone off it would look like a deliberate act on the toggle switch and if he pulled it out it could be said to be accidental?

A It's an argumentative point. It's much more difficult to do the latter than the former, sir.

Q Now, in making the transcript does it contain, does it contain only what came through on the tape or did it contain anything that doesn't appear on the tape, such as what Mr. Rosenberg or Mr. Copeland may have showed you transpired in the car which wasn't taped?

A I'm sorry, you have to explain that. I don't understand what you're driving at, sir.

Q All I meant was this: a considerable portion of the conversation of Mr. Rosenberg came through, but when he got back to the car the Kel unit went off.

Are we to presume there was a conversation

between Mr. Rosenberg and Mr. Copeland in the car which was not transmitted? Was any portion of that conversation on the transcript?

A The portion not transmitted?

Q Yes.

A There was no way of putting it on there if it wasn't on the tape, sir.

Q Now, did you hear the tape, the original tape replayed?

A Yes, I did, sir.

Q Did you notice how many gaps there were in playing it, how many disruptions?

A I don't recall, sir. On the type of equipment I heard it on, it would be almost indiscernible.

Q Is it possible that there were five interruptions in that particular tape?

A There could be, sir. I don't know.

Q And when there is an interruption in a tape, isn't that an indication that the recording was not continuous?

A I would have to qualify that by saying that it depends on the type of interruption that's occurred in a tape.

Now, there were several ways that an interruption

could occur in the tape. First of all, through the manufacture of the tape, the magnetic field may have been disturbed because these things are mass produced.

If you mean was the unit itself shut off and then turned back on to omit something, I would have to say no.

Q Well --

A That would be a definite and discernible click, even to an untrained ear, just the same as shutting off any other unit which, if you care for, I would demonstrate.

Q What I am saying here is if you do have interruptions in the tape, couldn't that be an indication of a possibility that the entire recording was not continuous, that it was interrupted at a point, picked up again at a later point there that there may have been something left out?

A I would say in this particular case, sir, I doubt it.

Q I am not asking you in this particular case.

THE COURT: We are interested in this case, Mr. Klein, not in some speculation what might have happened. We are interested in this case.

MR. KLEIN: I know it's not the Mary

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Woods case, your Honor.

THE COURT: A friend of yours?

MR. KLEIN: Mary Woods was President Nixon's secretary, your Honor.

THE COURT: It has nothing to do with this case, it has nothing to do with this case.

MR. KLEIN: Mr. Ryan has been offered as an expert.

THE COURT: We are interested in what happened in this case and you're voir diring as to this transcript and as to this recording.

Q Mr. Ryan, when did you hear the tape last?

A I believe it was yesterday, sir.

Q Were you listening for interruptions specifically?

A No, sir, I wasn't.

Q Is the cassette the usual type of tape that's on there, on the Kel transmitter, or is it a reel?

A On the particular unit that we use, it was designed to be used with a cassette. There are reel to reel recorders, though.

Q Did you have anything to do with the making of the transcript?

A-307



A The transcript of it from the tape to paper, sir?

Q Yes.

A No.

MR. KLEIN: I have no further questions, but I don't think we have enough as far as the transcript is concerned. There has not been anything established of who made it.

THE COURT: He has read it and it's a true and accurate transcript.

Is this a true and accurate transcript of what is on the recording?

THE WITNESS: Yes, sir.

THE COURT: And it's just as you heard it when it was received the day you were in the car receiving it?

THE WITNESS: Yes, sir, I would say so, to the best of my recollection.

THE COURT: Do you know of any changes?

THE WITNESS: No, sir, not that I know of, no.

MR. KLEIN: I thought I might inquire from the person who made it.

THE COURT: If it's true and it's an accurate transcript and he states it's an accurate

A-308



transcript and if when it's heard there is some discrepancy, we will address ourselves to that.

MR. KLEIN: Can I ask Mr. Ryan a question again?

THE COURT: Surely.

BY MR. KLEIN:

Q Mr. Ryan, did you know when the transcript was being prepared? Were you aware of the fact that a transcript was being prepared?

A I don't believe so, no, sir.

Q Was the first time you saw the transcript after it was completed?

A I don't recall, sir.

MR. APPLEBY: He would have to see it after it was completed.

MR. KLEIN: What I had in mind was, your Honor, if somebody was typing it and showed it to Mr. Ryan and he said, "No, that wasn't what I heard," and made corrections --

THE COURT: Did you assist in making the transcript in any way?

THE WITNESS: No.

One point I think I should make is when those recordings are made, it's a

MR. APPLEBY: I would ask this be marked

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rather laborious task because you must use phonetics, more than writing a book. It's a rather difficult thing to do.

Q You mean the recordings or the transcript?

A The transcript.

THE COURT: Mr. Ryan, did you assist in any way in making the transcript?

THE WITNESS: No, sir, I did not.

THE COURT: Is the transcript a true and accurate transcript of what appears on the tape?

THE WITNESS: Yes, sir, it is.

THE COURT: Received in evidence on behalf of the Government.

Mark them in evidence.

THE CLERK: Government's Exhibit number 21 and 22, previously marked for identification, received in evidence.

(So marked.)

THE COURT: Maybe we will take a short adjournment.

We will take a ten minute adjournment. The jury may leave.

Please do not discuss the

(Whereupon the transcripts referred to are passed among the jurors.)

MR. APPLEBY: With your permission again, your Honor, I would like to play the tape which is Government 21, I believe.

THE COURT: You may.

(Whereupon the tape recording referred to is played.)

MR. KLEIN: At this time I respectfully move to strike the transcript and the tape on several grounds.

There has been no proof offered as to the identity of the voice which was marked here as Setter. There was no proof that Mr. Setter was in the house at the time.

THE COURT: We can take argument on that outside the presence of the jury.

MR. KLEIN: All right.

And then also, I think the word "gig" is there twice and somebody corrected it and put a "J" instead of a "G" on the first page. And our contention is -- I would also like to ask your Honor to again remind the jury that it's what they heard on the tape.

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THE COURT: Yes, it's what t ey heard on the tape, not what is on the paper.

What you actually hear is what you accept. You don't accept the paper. The transcript is only a guide for you to follow it, to make it easier for you to follow it. But it's what you actually hear what you accept and not otherwise.

Is there anything further with the witness?

MR. APPLEBY: I have some further questions, your Honor. If you want to contin[illegible] think I can.

THE COURT: Would you want to stop for the day?

MR. APPLEBY: That would be fine.

THE COURT: We will adjourn for the day.

The case is still on trial. Tomorrow morning I have some cases on for a 10:00 o'clock calendar. So we can start at 11:00 o'clock tomorrow.

The jury may leave.

Please do not discuss the

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case with anyone on or off the jury.

11:00 o'clock tomorrow morning.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

MR. KLEIN: Do you wish the argument now?

THE COURT: Yes, we can have it now. It's up to you if you want to do it now.

MR. KLEIN: Your Honor, there is no identification. There is no proof adduced in this case that Mr. Setter was in the house at the time. Nobody has testified seeing him enter the house, leave the house or in the house.

MR. APPLEBY: There was testimony by Officer Golub who saw him go in the house just before the transaction occurred.

MR. KLEIN: I don't recall that.

MR. APPLEBY: Yes. Officer Golub saw him go into the house just prior to the transaction

MR. KLEIN: There was no evidence he was seen speaking to Mr. Rosenberg. There was no testimony he was in the house, or the only one

in the house. Usually an eye witness says, I had a conversation with Mr. Appleby and then you play the tapes because then you identify Mr. Appleby and me as the two parties. That's been absent here.

There is no foundation. And just because whoever types the transcript is told that's Mr. Setter, it doesn't make it Mr. Setter.

So I respectfully ask it be stricken and the jury asked to disregard both the tape and the transcript. There was no proper identification there.

THE COURT: Yes.

MR. APPLEBY: It's true Officer Ryan didn't positively identify that voice as Setter. But the inference overwhelming now is that it was Mr. Setter on the conversation. And one of the arresting officers knows him well, is the officer who arrested him. I can have him identify the voice.

But aside from any identification of the voice itself, I think the inference is clear that it was Setter in the house.

Moreover, your Honor, we already heard another transcript between Copeland and the defendant and the voice is similar and the jury is the one to decide that question of fact. It doesn't go to the admissability of the evidence. The jury can decide whether it wasn't him.

But based on the previous telephone call which Detective Copeland identified, I think it's clear it's the defendant's voice.

THE COURT: You may have to give the Court further proof on the identity of whoever was talking at that point.

MR. APPLEBY: There are many agents who know the defendant's voice and that can be done.

MR. KLEIN: I would just point out that the quality of that tape was so poor in my opinion, even if I knew somebody -- I know Mr. Appleby's voice on the phone and I couldn't tell you it was Mr. Appleby if we had a tape like that.

THE COURT: The quality of the tape was poor, but there were portions of it that were audible and you can hear what was being said.

MR. KLEIN: Yes.

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THE COURT: Many portions of it.

MR. KLEIN: I am talking about identification of voice, your Honor.

THE COURT: There were portions of it you could hear. But there were portions of it where the quality of the tape was very bad.

MR. KLEIN: Yes. And I was going to question Mr. Ryan about the interruption. I heard the tape interrupted several times.

THE COURT: There were interruptions in the tape and you will have Mr. Ryan tomorrow on those issues.

MR. KLEIN: One other point. I know it's late, but I want to make a point.

THE COURT: Take your time, take your time.

MR. KLEIN: Didn't you say you have to go somewhere?

THE COURT: No. I have a calendar at 10:00 o'clock.

MR. KLEIN: I thought I heard something about Southern District.

THE COURT: No.

MR. KLEIN: All right.

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I wanted Mr. Ebert called as a witness.

MR. APPLEBY: On your behalf?

MR. KLEIN: If you produce him, yes. Because as I understand the law on suppression, and this is a very key element in the case, I have to make my motion in front, but I can move again at the end of the trial.

THE COURT: Yes, you may.

MR. KLEIN: Yes, depending on the evidence, if the evidence is different or something new develops in the testimony at the trial different from the hearing.

THE COURT: Yes.

MR. KLEIN: At the hearing I wasn't entitled to the 3500 material, so I didn't get it.

After the hearing I got the 3500 material and I have Agent Ebert's testimony. And from it it appears that the statement about, "Do you have any narcotics," the question, "Do you have any narcotics," that seemed to have been asked out in the driveway and Agent Ebert specifically said --

THE COURT: We will bring him in.

You will have to get that from the witness on the stand. We will bring him in for that purpose.

Is there any problem?

MR. APPLEBY: Yes, there is a problem, unfortunately.

I was the one who really released Agent Ebert. I didn't release him, but he had to leave for Milwaukee.

SERGEANT RAWALD: He was transferred today, sir.

THE COURT: You have to bring him right back.

SERGEANT RAWALD: He is travelling by car and he left this morning and until he arrives there I have no way of getting in touch with him.

THE COURT: Bring him back. Put him on a plane and have him brought back here. That's what you have to do.

You should have mentioned it and I would have told you to hold him.

MR. APPLEBY: I'm sorry it happened, your Honor.

THE COURT: You just have to get him

back. This seems to be an issue Mr. Klein wants to bring up and he is entitled to do that.

MR. APPLEBY: I thought Agent Ebert was really a witness for the Government and I didn't think he would [illegible]vorable to the defense.

MR. KLEIN: I wasn't aware of his Grand Jury testimony at the time. I assumed he would be called.

THE COURT: Bring him back. There is nothing else you can do.

Anything further this afternoon?

MR. KLEIN: No.

MR. APPLEBY: What is your Honor's feeling about summation and charge in this case?

THE COURT: I would like to have your request to charge as soon as I can tomorrow, if possible.

As far as summation, I don't prescribe any time limit.

MR. APPLEBY: Do you feel it will probably be on Friday?

THE COURT: I will see tomorrow and we will see because the defendant's case has to

go in.

MR. APPLEBY: Yes, I understand. But in no event will the summations take place tomorrow?

THE COURT: No, no, no.

MR. APPLEBY. That's all I wanted to find out.

THE COURT: Anything further?

MR. KLEIN: No, sir.

THE COURT: All right.

11:00 o'clock tomorrow.

MR. APPLEBY: One other matter, your Honor.

THE COURT: Yes.

MR. APPLEBY: About this voice identification, if Mr. Klein wants to clear this up, what the agents can do is take a tape of Mr. Setter's voice right now and we can have somebody analyze it. I understand one of the procedures for voice identification is for the Court to require the defendant to say something in Court. There is no Fifth Amendment privilege that.

If Mr. Setter is willing to to it, we are willing to take a tape of his voice and analyze it next to the tape to clear this

matter up, if that's what he wants to do.

MR. KLEIN: That's not admissable in Court, your Honor, voice identification test.

MR. APPLEBY: Yes.

MR. KLEIN: It's not admissable.

MR. APPLEBY: My understanding of the law is -- I may be incorrect about it --

THE COURT: I'm not sure.

MR. KLEIN: I don't think so.

THE COURT: It may be admissable, it may be similar to exemplars.

MR. KLEIN: It's similar to polygraphs. It depends on the particular reader. And Courts have found, except in one jurisdiction, California, that they do not allow it because there are too many variations.

THE COURT: I don't know whether it is or not, and you will have to show me authority on it. If you show me authority and it is admissable, we can proceed along that fashion.

MR. APPLEBY: I was just doing it for the benefit of the defendant.

THE COURT: We can do it tomorrow. And in the meantime, try

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to get ahold of Agent Ebert and get him back.

Thank you.

(Whereupon the case on trial is adjourned until 11:00 o'clock A.M., Thursday, May 27, 1976.)

MR. KLEIN: I don't want you to get the wrong impression. Please don't hold anything against him in this trial.

THE COURT: I am not holding anything against him in this trial. I am trying to try the case as best as I can. Anything wrong in the trial as far as you know?

MR. KLEIN: No way.

THE COURT: Any unfairness?

MR. KLEIN: No way.

THE COURT: That's all I want. That has nothing to do with this trial.

MR. KLEIN: Correct.

THE COURT: Absolutely nothing.

Okay?

MR. KLEIN: Yes.

THE COURT: Ready to proceed?

MR. KLEIN: Yes.

THE COURT: All right.

MR. KLEIN: Am I correct, Number One is not in evidence yet?

THE COURT: It's not in evidence.

MR. APPLEBY: After I get more testimony from Officer Ryan I will be offering it in evidence.

THE COURT: It doesn't look to me that you will get Number One in evidence at this point. Maybe there will be additional proof, I don't know. But it doesn't look that you will.

MR. APPLEBY: Can I make an offer of proof?

THE COURT: Yes.

MR. APPLEBY: Officer Ryan will testify Mr. Rosenberg was searched before he went into Mr. Setter's residence.

THE COURT: I think Copeland testified to that.

MR. APPLEBY: I don't recall that.

Anyway, when he came out he was searched again and he had the cocaine on him.

There is a Kel set recorder between Mr. Setter and Mr. Rosenberg.

After Officer Ryan testifies there will be identification of that voice as being Mr. Setter.

And just prior to the transmission Mr. Setter is seen entering the residence. Just after the transmission he is

seen exiting the residence and entering the automobile to take him back to his place of business, Exclusive Motors.

THE COURT: I doubt you have enough for me to hold him on the first two counts with what appears to be before the Court.

MR. APPLEBY: Did you look at United States v. Fiori, your Honor?

THE COURT: Yes, I looked at it five minutes ago.

MR. APPLEBY: The Fiori case --

THE COURT: Where the informant testified? If you do that here, I will agree with you. If you do that here I will agree with you. The informant testified. That's the real big difference.

MR. APPLEBY: But it's clear that the informant -- the whole thing was not based on the informant testifying.

Now, here there is a recording between the defendant and the informant talking specifically about cocaine.

THE COURT: Mr. Appleby, the nature of the recording is such that it makes it difficult

for the Court, it really makes it difficult. But I don't agree with you.

MR. APPLEBY: When you say difficult, your Honor --

THE COURT: Well, you have three counts left. They appear to be proper. That's as much as I will tell you at this point until we see otherwise.

MR. APPLEBY: When you say difficult, your Honor, with respect to the recording, I'm not sure I quite understand you.

THE COURT: That recording -- it's going to be difficult.

How can you identify the individual you may say is Setter anyway, apart from the fact that it's presumed this is who he was talking to?

MR. APPLEBY: There will be an agent who comes on the stand who has heard Mr. Setter's voice, who after the arrest processed him, knows the voice, recognizes the voice on the tape.

THE COURT: Put the additional proof in and we will see.

MR. APPLEBY: I think the circumstantial

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evidence that that's Mr. Setter is just overwhelming in this case.

THE COURT: Well, I wouldn't fully agree with you.

MR. APPLEBY: Who else is it besides Mr. Setter, your Honor?

THE COURT: I don't know.

MR. APPLEBY: I don't think there is any other reasonable explanation other than the fact that it is Setter.

I would respectfully ask your Honor after you hear the voice identification to reconsider.

THE COURT: After I hear the voice identification I will see exactly.

MR. APPLEBY: If there was any belief on my part if there was any problem with respect to those parts, I wouldn't go ahead with them. Because I run the risk, and I am convinced --

THE COURT: You go ahead and I will consider it fully and I will listen to the voice identification. You go ahead in that area.

MR. APPLEBY: Yes, your Honor.

THE COURT: Thank you.

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Are we ready to proceed?

MR. KLEIN: Yes, sir.

THE COURT: All right.

Bring in the jury.

(The jury enters the courtroom and the following takes place in open Court and in the presence of the jury.)

J O H N R Y A N, previously sworn, resumes the stand and further testifies as follows:

THE COURT: Good morning, ladies and gentlemen.

We will proceed with the Government's case.

You may proceed, Mr. Appleby.

DIRECT EXAMINATION (continued)

BY MR. APPLEBY:

Q Officer Ryan, we finished off where we heard the recording on April 17th.

Now, directing your attention again from the time you were on surveillance in Mr. Setter's residence on April 17th, before Mr. Rosenberg entered Mr. Setter's residence for the first time, did you do anything with respect to searching him?

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A Yes, sir. As a matter of fact, prior to the time when Mr. Rosenberg was wired at our office I searched him and Special Agent Ebert witnessed the search.

I found Mr. Rosenberg to be in possession of just personal articles, his wallet, and containing some cards and various papers and approximately $12.00 in US currency.

Q Did there come a time when you searched Mr. Rosenberg again?

A Yes, sir. Once we returned to the office and the wire was taken off Mr. Rosenberg, he was again searched by me and found to be in possession of the same articles he was at that earlier time.

Q Incidentally, when was the initial decision made that Mr. Setter was a target of the investigation?

MR. KLEIN: I will object to that, sir.

THE COURT: Sustained.

Don't answer the question.

MR. APPLEBY: On what basis, your Honor?

May I have a side bar, your Honor?

THE COURT: Yes, sure.

(The following takes place at side bar out of the hearing of the jury.)

MR. KLEIN: Do you want the basis of the objection?

MR. APPLEBY: Yes.

MR. KLEIN: It was hearsay and it calls for an operation of the mind.

THE COURT: It's irrelevant.

MR. APPLEBY: Your Honor, the agent is the case agent. He is the one who was working with Mr. Rosenberg. Mr. Klein has definitely put this entrapment defense in issue at this point.

Obviously, when Mr. Rosenberg began working on the Setter case is relevant to the issue of entrapment. In other words, how long was there -- how long -- how many times can Mr. Setter -- Mr. Rosenberg, excuse me, contact Mr. Setter is certainly relevant to the issue of entrapment. Mr. Setter is obviously going to get on the stand and claim that Mr. Rosenberg pushed him into this and coerced him into this and it's important to the timing of this.

THE COURT: That puts a different light on it, Mr. Klein.

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What is your position as to this?

MR. KLEIN: I would say under that context it would be relevant, but not right at this point.

Now, can this agent testify how many times Rosenberg --

MR. APPLEBY: I will only ask him when the decision was made to investigate Setter. He was the case agent.

THE COURT: Based on the defense that your --

MR. KLEIN: I will object to when the decision was made. But if he knows how many times Rosenberg went over there, from when to when, if that's all he knows.

MR. APPLEBY: That's solely up to his knowledge when the decision was made. That's relevant. He can't testify as to what Rosenberg did.

MR. KLEIN: The decision was made orally; one person says to the other, "Let's get Setter." That's hearsay.

MR. APPLEBY: This is asking when the

investigation began. I don't see anything improper with that.

MR. KLEIN: If I come in and show six months before that --

THE COURT: I think it's something that can properly come in during rebuttal. But at this point the defense has not been raised, although he is going in that direction.

MR. KLEIN: If I show six months of Rosenberg meeting with him and then you put your man on --

MR. APPLEBY: Can I ask you now, are you raising the issue of entrapment?

MR. KLEIN: Yes.

MR. APPLEBY: Wouldn't it be a lot simpler instead of recalling the agent --

THE COURT: I don't want you to anticipate in that fashion. I would rather you go along and I will leave the ruling just where it is. And in rebuttal I think you can properly use that.

MR. KLEIN: Yes, your Honor.

MR. APPLEBY: Yes.

(The following takes place in open Court and in the presence of the jury.)

BY MR. APPLEBY:

Q Officer Ryan, I would like to direct your attention to April 24, 1975.

Were you on duty on that day?

A Yes, sir, I was.

Q Where were you on duty?

A At the New York Joint Task Force.

Q Did there come a time you were on a surveillance team?

A Yes, sir.

Q Where was the surveillance?

A The surveillance was in Brooklyn.

May I refer to my notes, counselor?

Q Yes, sir.

Officer, I will show you 3500-4 for identification and ask you if it refreshes your recollection.

(Handed to the witness.)

A Yes, sir, it does.

Q Where were you, sir?

A On that afternoon I was on surveillance with my partner, Special Agent Rose at the Grotta D'Oro

Italian restaurant, 691 Flatbush Avenue, Brooklyn.

Q Do you recall approximately what time you were there?

A At approximately 3:20 P.M., sir.

Q What did you observe?

A I observed Mr. Setter park his 1974 Cadillac with New York dealer registration 42852, New York.

Q Don't read from your report. Just tell us what you recollect.

A In the vicinity of the restaurant he approached Mr. Rosenberg, who was standing on the corner in front of the restaurant, and they exchanged pleasantries and entered the restaurant.

Q Continue.

A A short time after that Detective Copeland also entered the area, exited his vehicle and went into the restaurant.

Q Did you observe anything further?

A No, not in the restaurant, sir.

Q All right.

Police Officer Ryan, I would like to direct your attention to April 28, 1975.

Again, were you on duty on that day?

A Yes, sir, I was.

Q Directing your attention to approximately 10:00 P.M., where were you and what were you doing?

A I was on surveillance in the vicinity of Mr. Setter's house.

Q What did you observe?

A May I see the case file, counselor?

Q I show you 3500-6 for identification and ask you if that refreshes your recollection.

A Yes, sir, it does.

Q And can you tell us what you observed?

Does that refresh your recollection?

A Yes, sir, it does.

Q Without looking at the report, can you tell us what you recall having heard on that day?

A Yes, sir.

On that day, that specific time you mentioned, I observed Detective Copeland park his vehicle in the vicinity of Mr. Setter's house and enter Mr. Setter's residence.

A short time after that I observed Detective Copeland leave Mr. Setter's residence, enter his vehicle and leave the area.

I maintained surveillance in the vicinity of Mr. Setter's house for a short time after that and, if

I recall directly, the lights on Mr. Setter's house were turned out.

Q Do you recall what time that was?

A Not exactly. If I look at the report, I can tell you.

I maintained surveillance until approximately 11:15 P.M., in that vicinity. I would say shortly prior to 11:15 the lights in Mr. Setter's house were shut off.

MR. APPLEBY: One moment, if your Honor please.

(Mr. Appleby and Sergeant Rawald confer with each other out of the hearing of the Court Reporter.)

Q You wrote out a report with respect to this surveillance. Isn't that correct?

A I made a report.

Q When did you write the report after the incident?

A The report is dated April 29, 1975.

Q So you wrote the report --

A The following morning. I went off duty that evening, approximately 11:30 or 12:00 o'clock, and I wrote it the next morning when I arrived at my office.

MR. APPLEBY: Thank you, sir.

No further questions.

THE COURT: All right.

Cross-examination, Mr. Klein.

CROSS-EXAMINATION

BY MR. KLEIN:

Q Mr. Ryan, yesterday you identified a typewritten transcript of the tape of April 17th.

A Yes, sir.

Q And I happen to have one here.

Is this in the same condition as when you first saw it?

By the way, when did you first see the transcripts?

A I believe the first day of trial when I was with the US attorney.

Q And is this in the same condition -- look at page one particularly.

Is it in the same condition it was when you first saw it?

A I would believe so, yes.

Q I invite your attention to two instances toward the bottom of the page where the typewritten word is "gig" and somebody in pen and ink apparently

wrote "J" to make it "jig," instead of "gig."

Was that on it when you saw it?

A I believe so.

Q Do you know who put it on it?

A No, I don't.

MR. KLEIN: Can you tell us, Mr. Prosecutor?

MR. APPLEBY: I believe -- I made some changes. It could very well have been me, Mr. Klein. There are a few of those changes made on the transcript. As a matter of fact, there wasn't even a complete transcript of that recording until just a few days ago, as I indicated to you.

MR. KLEIN: Do I understand a number of people worked on that transcript and made changes?

MR. APPLEBY: Officer Golub also. But the jury can recollect as to what the conversation was.

MR. KLEIN: That's correct.

Of course, it's improper of me to ask the prosecutor, but --

Q You had no knowledge of how many people gave their version of what they heard on the tape

before it reached that final form, do you?

A No, I don't. But actually the only thing that really matters is what you hear on the tape rather than the transcript. So the transcript is really insignificant.

Q I would agree with you on that, sir.

Mr. Ryan, you conducted surveillance on the 17th, April 17th?

A The date of the first purchase, yes.

Q Yes.

And do you know that those are two of the counts that are contained in this indictment, possession and sale to Harvey Rosenberg?

A That's correct, sir.

Q And did you make -- did you or any of your brother officers go in and arrest Mr. Setter at that time?

A No, sir.

Q Wouldn't the crime have been complete at that time if there was a crime?

A Yes.

Q No arrest was made?

A No.

Q On April 28th were you also on surveillance

at the time Detective Coleman (sic) allegedly made the purchase from Mr. Setter?

A Detective Coleman, counselor?

Q Excuse me, Copeland.

A Yes, I was.

Q That crime, if there was one, was completed at that time also. Isn't that correct?

A Yes, sir.

Q Was an arrest made at that time?

A No, there was not, sir.

Q That was April 17th and April 28th.

When for the first time in this case was Mr. Setter arrested?

A I have no idea. I was not there, sir.

Q Suppose I tell you it was July 3rd. Would you accept my word on that?

A If that's what is on the record, sir, I would accept it.

MR. KLEIN: Wouldn't you say that, Mr. Appleby?

MR. APPLEBY: July 3rd is the date of the arrest.

MR. KLEIN: Yes, the date of the arrest.

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Q On April 17th, did you remain on surveillance after Mr. Rosenberg, the informant, left the house?

A I don't believe so, sir. If I recall correctly, I returned to the office.

Q Immediately after he left?

A Well, shortly thereafter. You can't have a big mass exodus.

Q Yesterday I asked you before we heard the tape on the voir dire, I asked you: Did you listen specifically for any interruptions? And you said, no, you hadn't.

Then yesterday we played the tape and were you aware of any interruptions in that recording?

A Yes, sir.

Q About how many?

A There are two kinds of interruptions on that tape at the present time. Several of the interruptions that were on the tape are interruptions which occurred because of some type of outside interference on the tape.

Q That's on the inaudible portions?

A Not specifically inaudible portions.

Q Yes.

A There are, I believe, two additional interruptions on the tape which were caused because the officer who transcribed the tape improperly used the machine upon which he was listening to the tape as far as returning to a portion of the tape that he was listening to.

If I might explain to you, when you transcribe from a tape it might be necessary for you to listen to a sentence, return to the beginning of the sentence, listen to it again and possibly return again to get voice inflections, possibly variations in use of language or something like that. Because, as I explained yesterday, you are dealing with phonetics if you transcribe a tape.

So, two -- two of those interruptions which were on the tape were caused by the officer who transcribed the tape and the fact that they are audible clicks on the tape caused by the transcribing machine itself.

Q And when did you hear the tape after the first recording?

A After the first? I played it back the day I returned to the office.

Q And since then have you ever heard the tape until it was played in Court here?

A Yes, I heard it several times.

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Q Several times.

Are you telling us that after hearing the tape yesterday you first became aware of those interruptions?

A To tell you quite frankly, counsel, I never entertained a thought about it at all because they are not of any significance.

Q And from hearing this played yesterday, is it your testimony you could tell how that interruption came about?

A Which interruption are you speaking about?

Q The latter two interruptions.

A Yes, I would say so.

Q Is it your testimony you would lay the blame solely and entirely on the person who was operating the machine or transcribing the written portion and that there was no malfunction in the machine or the operation of either the transmitter or the recording device at the very moment the tape was being made?

A For the latter two interruptions, I would say so, yes. They were discernible interruptions made by the machine used for transcription.

Q Couldn't that interruption, either one of

those two interruptions, be made by a malfunction in the transmitter?

A No, sir. Because they weren't on the tape when I originally listened to it.

Q Those weren't on the tape?

A No, sir.

And as a matter of fact, they were not on the tape the first day I listened to the tape in the US attorney's office.

Q And now it is on the tape?

A Now it is on the tape.

Q I ask you, was the tape you originally listened to and the tape that you now heard, are they identical or were portions cut out?

A No, portions were cut out of it.

Q Isn't it possible -- excuse me, yesterday you were talking about various kinds of interruptions which would cause static or create inaudibility. You mentioned the rustling of the clothes and certain materials give off a greater rustle than others, like Acrilan or certain polyester fabrics.

A I didn't testify about any fabrics. I said movement of clothing would be picked up by the tape.

Q And if a person who was wearing a Kel

transmitter was aware of these things that would cause static and cause an inaudible portion, could he not deliberately create a static or an outside interference so as to obliterate an answer he didn't wish to be recorded?

MR. APPLEBY: I object to, "could have" your Honor.

THE COURT: Sustained.

Q Did you notice yesterday that in playing the tape and in reading the guide, the transcript, that most of the inaudible portions were attributed to Mr. Setter?

A Many of them are. And if I might, I would explain why.

Q Just answer.

Isn't that so?

MR. APPLEBY: I ask he be allowed to finish his answer.

THE COURT: No. He is doing the cross-examination and I will allow him to do it in his way.

THE WITNESS: Would you repeat the question, please?

MR. KLEIN: Why don't you read it, Mr.

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Reporter, please.

(The Court Reporter reads the requested portion.)

Q Now, before you testified here you discussed this case in your testimony with Sergeant Rawald?

A I prepared the case with my supervisor, yes.

Q And who was your supervisor?

A Sergeant Rawald is my supervisor.

Q And when is the last time you discussed it or prepared it with him?

A This morning.

Q Thank you.

And yesterday did you also prepare it before you testified? Did you speak to Sergeant Rawald about it?

A In preparing a case you normally speak with --

Q Did you actually do it?

A The supervisor, certainly; certainly.

MR. KLEIN: Thank you.

THE COURT: I don't know, what is it?

MR. KLEIN: I'm sorry, I thought when I walked away I was finished.

THE COURT: I don't know. Were you?

MR. KLEIN: Yes. I'm sorry.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. APPLEBY:

Q I just want you to complete the answer as to why there were more inaudibilities on Setter's part than on Rosenberg's part.

A You have to realize Mr. Rosenberg was wearing the transmitter and he was, therefore, standing closer to the microphone. And where Mr. Setter's conversation is inaudible, Mr. Setter was obviously standing at a distance from Mr. Rosenberg.

MR. APPLEBY: No further questions.

THE COURT: Anything further?

MR. KLEIN: Yes, sir.

RECROSS EXAMINATION

BY MR. KLEIN:

Q Now, were you there when Mr. Rosenberg received instructions on how to use it?

A I instructed him on the use.

Q You instructed him.

And did you tell him the purpose of this is to make a permanent recording of what the other person is going to say? Is that right?

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A That's right.

Q And did you tell him to get in focus with him, line him up so he talks into the microphone? Didn't you tell him that?

A Quite obvious --

Q Didn't you tell him that?

A Quite obviously you can't tell somebody that because it would look a little silly if Mr. Rosenberg walked around stayi approximately a foot away from Mr. Setter and facing h'm directly.

I think Mr. Setter would have become quite suspicious, wouldn't you say so?

Q You didn't answer my question. I asked you: Didn't you give him any instructions?

A I told him to stay as reasonably close as possible and not to worry about it because I didn't want him to jeopardize his --

Q And I assume when you placed the microphone you didn't stick it in his shoe, you put it somewhere in the front of his body so when he is talking eyeball to eyeball to a person, if he could hear it here, it could be heard here (indicating).

Where did you put it, on his belly?

A What, sir?

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Q The microphone.

A The microphone was on his chest.

Q That's what I mean, his chest.

And the chest is closer to the person he is talking to than his ears. Isn't that right? It's certainly not further away, is it, even if he had a sunken chest?

A Counselor, that's kind of an odd question to answer because if a person is standing in a different kind of position his ear could be closer to the individual.

For instance, if Mr. Rosenberg would be bent over to Mr. Setter, his head would be closer to him than his chest and the microphone would be better in the ear.

Q Did you see Mr. Rosenberg's posture?

A No, sir.

Q You don't put the microphone in back of the person between the shoulder blades, do you?

A The microphone could be put on any part of the body that's deemed the most appropriate part at that time.

Q And here you put it on his chest?

A In this particular instance, yes.

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Q And Mr. Rosenberg, who was wearing the device and went there for a sole purpose of guiding a conversation and recording it, felt that the person to whom he was speaking, Mr. Setter, was out of range or mumbled something or wasn't sure that it would be recorded, all that Mr. Rosenberg had to do was merely to say, I didn't hear what you said, Joe, what do you mean by that, and then we would have had a repetition and he would have gotten it the second time. Isn't that normal, if you don't hear a person the first time, you say, pardon me, I didn't hear what you said, would you mind repeating it?

A Yes, but --

Q I just asked that, yes.

MR. APPLEBY: Let him finish.

MR. KLEIN: I am asking for a yes or no answer and he is giving an explanation.

THE COURT: Are you giving him a set of facts that you feel are reasonable and you are not permitting him to answer to them? If you create a statement of facts to that nature, you should specifically let him give you a reasonable answer.

MR. KLEIN: All right.

Q Go right ahead, sir.

A I'm sorry, you will have to repeat the question, counselor.

Q I will go with another question.

MR. APPLEBY: Would you like the Court Reporter to repeat it, if you would, please?

THE COURT: Repeat it for them.

(The Court Reporter reads the requested portion.)

THE WITNESS: Thank you.

Q Would you continue with that, please.

A In a particular instance like this it would be quite obvious to Mr. Setter that Mr. Rosenberg heard what he said. So in an instance like this it quite possible would have jeopardized Mr. Rosenberg's position at the time by having him constantly having Mr. Setter repeat himself.

You must understand, counselor, that in situations like this the individual who is doing the undercover work, his life is usually in a significant amount of jeopardy.

MR. KLEIN: At this time I ask for a withdrawal of a juror and the declaration of a mistrial because of that gratuitous statement.

And I had tried to keep this question down to a yes or no and you permitted this witness to ramble on and on.

THE COURT: We will take a -- I'm sorry.

MR. KLEIN: You permitted him to ramble on and inject a poisonous note in the case.

THE COURT: I didn't lead him into that. Don't say that he said that because of the Court.

MR. KLEIN: No. You permitted him.

THE COURT: He said that of his own free will.

Of course, you're doing the cross-examination.

We will take the jury out for ten minutes.

Please do not discuss the case.

(The jury leaves the Courtroom and the following takes place out of the presence of the jury.)

MR. KLEIN: Did you see what just happened, your Honor?

THE COURT: I didn't see what happened.

MR. KLEIN: The juror in the back had his shoes off and couldn't get them on.

THE COURT: He has been having them off for the last two days. You didn't notice.

MR. KLEIN: No, I didn't.

THE COURT: He has been having his shoes off for the last couple of days. It may be new to you, but the Court had seen it every day.

MR. KLEIN: I hadn't seen it.

THE COURT: Of course, it's comical to you, but there is nothing funny around here.

Go right ahead.

MR. KLEIN: I made a motion for withdrawal of a juror and a declaration of a mistrial.

THE COURT: Based on what?

MR. KLEIN: Based on the gratuitous nonresponsive answer given by the witness where he says that -- he theorizes and he says the person wearing the Kel transmitter would ask a question to be repeated, he would be placing himself in jeopardy because there was a certain amount -- a certain amount of danger involved.

THE COURT: You also made a statement to the effect that it was the Court's fault that this thing came about.

MR. KLEIN: No.

THE COURT: If you didn't say that, tell me what you said.

MR. KLEIN: No, you're not responsible for what the witness said.

THE COURT: Why did you inject the Court into it as being part of what happened?

MR. KLEIN: Because I tried to restrict him to a yes or no answer and you permitted him to continue on, and you permitted him to ramble on.

THE COURT: I permitted him to respond to the statement you were making.

MR. KLEIN: Yes.

By doing that, that answer -- that remark came out by the witness. If he hadn't been permitted to continue on, he wouldn't have made that.

I think it's an improper remark by the witness.

THE COURT: And you say this is the Court's fault?

MR. KLEIN: No.

You see, you didn't know what was coming out of his mouth, no more than I did.

THE COURT: That's right, that's right.

You see, the thing that you tried to do at that point with the jury present was inject fault against the Court.

MR. KLEIN: No.

THE COURT: That's what you did.

MR. KLEIN: No, your Honor.

THE COURT: That's what you did with the jury present.

MR. KLEIN: I will explain that to the jury. I had no such intention.

THE COURT: That's what you did and that's why I sent the jury out.

MR. KLEIN: I will apologize to the jury That wasn't my intention.

THE COURT: You see, you attempted to put the fault and the blame for the statement of the witness on the Court.

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MR. KLEIN: That was inadvertent.

What I'm saying is if you hadn't ruled that way, he wouldn't have been able to say it.

THE COURT: If you hadn't made that type of statement, it wouldn't have called for that type of response. Because your statement in many ways was ridiculous because anybody in an informant's position, who goes in with somebody in this type of a situation, can't walk up to the man and say, "Would you please speak a little louder, they are recording it outside."

Now, the thing you said had so much stupidity in it, I had to get some sort of an explanation. And he can't say to him, "Would you please repeat it because, you know, they didn't get it, you know."

Do you understand this?

MR. KLEIN: I understand what you're saying.

THE COURT: That's the type of question you were asking, that's the type of question you were asking. And it was of such a nature that what followed was because of the type of your

request. It wasn't what the Court permitted him. It's that you were putting this witness in a position where he had to explain why this man couldn't do the things that you asked him why weren't they done. That's what you did.

As far as the Court is concerned, you created the problem because you asked questions of such a nature that the response was what you got and it was what was called for.

Yes, Mr. Klein.

MR. KLEIN: I will rest on my motion, your Honor. I disagree with your Honor.

THE COURT: The motion for the withdrawal of a juror is denied. The Court will have to instruct the jury as to what came out of this witness and give them a limiting instruction as to that particular situation.

MR. KLEIN: You mean about the possible danger?

THE COURT: Yes, sir.

MR. KLEIN: All right, your Honor.

THE COURT: That's what I will do. I will give them a limiting instruction.

MR. APPLEBY: May I add one thing, your

Honor?

THE COURT: Yes.

MR. APPLEBY: I think the import of what Officer Ryan said was not directed specifically at the defendant, but he was saying in this type of a situation there is always an element of danger. It's a generalized comment and that's a far cry from saying he was specifically scared from the violence of the defendant. It's a difference in tone.

MR. KLEIN: I agree Mr. Ryan didn't say Mr. Setter was a danger to Mr. Rosenberg.

Is that right, Mr. Ryan?

THE WITNESS: It was a general answer.

MR. KLEIN: In that way it isn't as sharp as if it was specifically answered. And I think perhaps it may be that an instruction from your Honor might be in order.

THE COURT: That's what I intend to do.

MR. KLEIN: Yes, I think so.

Do you want me to tell the jury in making my objection I had no intention of --

THE COURT: I won't ask that. If you

feel that you want to, I am not putting any obligation on you whatsoever.

MR. KLEIN: I know, I know.

THE COURT: Because I don't want it to appear that in any way I am trying to force you into any situation. So I am not asking you to do anything.

MR. KLEIN: I am assuring you there was no such intention and I am telling you if you feel I should tell it to the jury --

THE COURT: No, I don't think you should I don't feel you have to say anything. If you want to say anything, you can do it. But as far as I am concerned, it's not required.

MR. KLEIN: Please accept my apology.

THE COURT: Perfectly all right.

MR. KLEIN: It wasn't intended.

THE COURT: These things happen. It's in the case and you're an advocate. What can I expect?

MR. KLEIN: Now I am trying to think how I can say that without hurting my client.

THE COURT: Say what?

MR. KLEIN: To the jury.

THE COURT: What?

MR. KLEIN: In explaining to the jury in making my last objection, the objection was to the witness' answer and not to the Court's ruling.

THE COURT: I don't think you have to make any explanation. I think if you just let it just stay where it is, I think you're better off, I think you're better off.

All right, do you want to bring the jury back in?

Bring in the jury.

(The jury enters the courtroom and the following takes place in open Court and in the presence of the jury.)

THE COURT: Ladies and gentlemen of the jury, the request by the defendant for a declaration of a mistrial by the Court was denied.

However, I wish to say to you in connection with the testimony of Officer Ryan, he made some statement to the effect that in the type of situation that Mr. Rosenberg was in, there is some possible danger of being hurt physically or by violence. And I wish to say to

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you that you are to draw no inference or no presumption that there was any threat or any possibility of violence as to Harvey Rosenberg in the situation that he was in when he was supposedly making the purchase which the Government alleges. And, therefore, no inference or presumption is to be drawn by you as to any threat of violence or any possible violence to Mr. Rosenberg at that time.

You may proceed.

MR. KLEIN: Right.

Thank you, your Honor.

BY MR. KLEIN:

Q Mr. Ryan, you mentioned something about you saw a yellow Cadillac or yellow Eldorado on the 17th or so.

A On the 17th?

Q One of those days, I believe. You said you saw Mr. Setter drive up.

A Do you mind if I look at my notes?

Q Sure. Go ahead.

A I said a 1974 yellow Cadillac. I didn't say an Eldorado, sir.

Q Right.

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Did you have an occasion, you or anybody in your department have occasion to run a motor vehicle check to see whether or not Mr. Setter did, in fact, own a 1974 yellow Cadillac?

A I don't have it recorded here. I'm not sure whether it was done or not, but I would say probably not because it was a dealer's plate.

MR. KLEIN: Thank you very much. I have no further questions.

THE COURT: Any redirect, Mr. Appleby?

MR. APPLEBY: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. APPLEBY:

Q How many Kel set recordings have you listened to in your experience as a police officer?

A I would say I have listened to at least 100.

Q And how would you say that this particular Kel set recording compares in terms of audibility with respect to these 100 you have heard?

A This particular one is one of the better ones I have heard.

Q Are there times when nothing comes out at all

A Many times, unfortunately.

MR. APPLEBY: No further questions.

THE COURT: Anything further?

MR. KLEIN: No, sir.

THE COURT: Thank you.

You may step down.

Give those to Mr. Appleby, those reports.

(The witness is excused.)

THE COURT: Yes, sir, Mr. Appleby.

MR. APPLEBY: In order to connect up the recording, the Government will call Sergeant Rawald, recall Sergeant Rawald.

THE COURT: Surely.

You are still under oath, Sergeant Rawald. You may be seated.

W I L L I A M R A W A L D, previously sworn, resumes the stand and further testifies as follows:

FURTHER DIRECT EXAMINATION

BY MR. APPLEBY:

Q Sergeant Rawald, you indicated in previous testimony that you had conversations with the defendant. Is that correct?

A Yes, sir.

Q Approximately how many conversations have you had with the defendant and where?

A Well, to the best of my knowledge I had conversations with him the day he was arrested, I believe also the day after his arrest and in subsequent conversations here in Court.

Q And approximately how long a period of time were these -- did these conversations take place?

A Well, the original one -- the day of his arrest I spoke to him for a couple of hours and there were other shorter conversations.

Q Have you had occasion to listen to all the recordings made in this case?

A Yes, sir, I have.

Q And you have had occasion to listen to the April 17th Kel recording. Is that correct?

A Yes, sir, I have.

Q You listened to the two individuals talking on that recording?

A Yes, sir, I have.

Q Did you recognize one of the individuals as Mr. Rosenberg?

A Yes, sir.

Q Did you recognize the other voice?

A Yes, sir, I did.

Q Who did you recognize that voice to be?

A I recognized it to be the voice of Mr. Setter.

MR. APPLEBY: No further questions, your Honor.

THE COURT: Cross-examination.

FURTHER CROSS-EXAMINATION

BY MR. KLEIN:

Q Sergeant, did you ever talk to Mr. Setter before you arrested him on July 3rd?

A No, sir, I didn't.

Q Now, we are talking about a taped transcription -- a tape, rather, a tape recording that was made earlier on April 17th.

A That one and others, yes, sir.

Q And have you ever spoken to Mr. Setter before April 17th?

A No, sir, I haven'

Q And have you ever heard Mr. Setter prior to the time you heard this tape? Did you ever hear Mr. Setter's voice on any other Kel tape?

A No, sir, not to my knowledge.

Q Have you heard Mr. Setter on any Kel tapes since, Kel transmitter tape?

A Other than this Kel tape?

Q Yes.

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A No, sir.

Q This is the only Kel tape you heard what you claimed to be Mr. Setter's voice?

A Yes, sir.

Q Now, were you on surveillance on the night this was made?

A On the night the Kel recording was made?

Q Yes.

A Yes, sir, I was on surveillance.

Q April 17th?

A Yes, sir.

Q And you observed -- did you observe Mr. Setter coming to his house?

A No, sir, I didn't.

Q But some of your team observed Mr. Setter come into his house?

A Yes, sir.

Q Shortly before Mr. Rosenberg went in?

A Yes, sir, I believe they did.

Q So you assumed or believed Mr. Setter to be in the house at that time. Is that correct?

A Yes, sir.

Q And you didn't see anybody else go into the house, did you?

A No, sir, I didn't.

Q And as far as you were concerned, the only person you knew to be in the house at that time is Mr. Setter?

A Yes, sir.

Q And then you knew from your own observation that Mr. Copeland, Detective Copeland -- excuse me, Mr. Rosenberg then went into the house pursuant to instruction?

A Yes, sir.

Q So you assumed the two of them were the two in there. Isn't that correct?

A Yes, sir.

Q And so when that tape recording was being made, for you to identify Mr. Setter's voice didn't you rely on the fact, according to your belief, that the only two people in the house were Mr. Setter and Mr. Rosenberg?

A At that particular time when I heard the tape, yes, sir. That's what I based it on.

Q Absent that fact, if you weren't there on the 17th -- you follow me so far?

A Yes, sir.

Q If you weren't there on the 17th, sir, and

all you did was hear a tape, that particular tape --

A Yes, sir.

Q -- that quality tape, could you positively identify one of those voices as Joseph Setter's, absent again the knowledge that he was in the house with Mr. Rosenberg?

A No, sir, I don't feel I could.

MR. KLEIN: I have no further questions, your Honor.

THE COURT: Your Honor, I do.

REDIRECT EXAMINATION BY MR. APPLEBY:

Q You have heard the May 19th recording between Copeland and Setter. Is that correct?

A Yes, sir.

Q You have heard a telephone conversation on April 10th between Rosenberg and Setter again?

A Yes, sir, I did.

Q And you listened to all three -- in other words, you listened to all three recordings?

A Yes, sir.

Q And you listened -- did you form any comparison to one of the voices on all three recordings?

A Yes, sir, I felt one of the voices was the same voice on all three occasions, the voice that

spoke to Detective Copeland, to Mr Rosenberg on the phone and to Mr. Rosenberg on the Kel set.

MR. APPLEBY: No further questions, your Honor.

THE COURT: Anything further, Mr. Klein?

MR. KLEIN: Yes.

RECROSS EXAMINATION

BY MR. KLEIN:

Q On the telephone conversation that was taped --

A Which one, sir?

Q How many did you testify to just now?

A One between Mr. Rosenberg and Mr. Setter, and one between Detective Copeland and Mr. Setter, telephone conversations.

Q You just talked to Mr. Appleby about both?

A Yes, sir.

Q Excuse me, I thought you talked about one.

In both of those cases, those telephone calls, who were those calls initiated by?

A One by Detective Copeland and the other by Mr. Rosenberg.

Q Pursuant to instructions?

A Yes, sir, pursuant to instruction.

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Q And also Detective Copeland pursuant to instruction, right?

A Yes.

Q And you were aware you were making those calls?

A Yes, sir, generally.

Q And you knew they were calling Mr. Setter's number?

A That's correct.

Q And you knew that the person on one end was Detective Copeland and you knew he was having a conversation with somebody in Mr. Setter's house who answered Mr. Setter's phone?

A No, sir. In fact, I believe on that occasion he called him at his place of business and asked for Mr. Setter.

Q Did you listen into it at all at the time?

A No, sir, I didn't.

Q Did Mr. Copeland tell you he spoke with Setter?

A Yes, sir, he did.

Q How about the other fellow, Rosenberg?

A Yes, sir.

Q Did he call from your office, also?

A No, sir, he called in the company of my assistant, Agent Richel and Investigator Boss under their direction from his place of business.

Q And he told to -- Mr. Rosenberg told you he spoke to Mr. Setter?

A No. Mr. Rosenberg didn't tell me anything regarding that one. Agent Richel did, because he was present when it happened.

Q Agent Richel said Rosenberg called Setter and he had taped the conversation and Rosenberg had spoke to Setter. Is that right?

A That's right, sir.

Q Absent that information which you received that Detective Copeland told you he had spoken to Mr. Setter, would you -- could you state positively --

MR. APPLEBY: I don't see the relevance of the absenting. The jury heard the same evidence the Sergeant heard. So I don't see why we have to push all that evidence aside.

THE COURT: That's true.

MR. KLEIN: This is the question of identification of a voice, your Honor.

THE COURT: Ask him what he has and is that what you made the identification on.

You say, absent; well, he didn't have it. And how could he identify it then?

MR. KLEIN: I will ask in the reverse, you mean positively instead of negatively?

THE COURT: I would think so. You say absent, and he doesn't have it. How can he identify it?

Q Let's go back to the other thing, the tape on April 17th. Isn't your identification of the voice of Mr. Setter's on that Kel tape based in part upon the fact that you believed the two people in the house to be Setter and Rosenberg?

A Yes, sir.

MR. KLEIN: Is that what your Honor meant?

THE COURT: You ask the question the way you want, Mr. Klein. That's a different question.

MR. KLEIN: All right, your Honor.

THE COURT: It's an entirely different question.

MR. KLEIN: It's the converse of it.

THE COURT: You ask the questions the

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way you want. It's not the way I want them. It's the way you want them.

Q Sergeant, referring now to the taped telephone conversation with Mr. Copeland, is your identification of that, the voice on that telephone tape as Mr. Setter's based in part upon the fact that Mr. Coleman (sic) told you that he had spoken to Mr. Setter and had taped it?

A In part, yes

Q And referring now to the other telephone conversation that Rosenberg made and one of your colleagues told you that Rosenberg -- that Rosenberg had made, Rosenberg had spoken to Mr. Setter and had taped it, is your identification of the voice as Mr. Setter's based in part upon the fact that you were informed that Mr. Rosenberg had spoken to Mr. Setter and that was the tape?

A In part, yes, sir.

MR. KLEIN: Your Honor, I'm going to ask a question --

THE COURT: Absent -- Mr. Klein is right -- absent the knowledge of the individuals involved, would you have said the same thing concerning the person who was in the tape, absent

the knowledge of the names of the parties involved?

THE WITNESS: No, sir, I wouldn't believe that.

MR. APPLEBY: May I interject for one moment, your Honor?

THE COURT: Yes.

FURTHER REDIRECT EXAMINATION

BY MR. APPLEBY:

Q Sergeant, I show you a transcript of the April 10th recording, and would you look at the beginning of that, please.

(Handed to the witness.)

A Yes, sir.

Q Now, you heard the April 10th recording. Is that correct?

A Yes, sir.

Q And Detective Copeland is asking for Joe Setter. Is that correct?

A Yes, sir.

Q At one point he says, Joe Setter, question mark.

THE COURT: Mr. Appleby, don't get ahead of yourself. Let Mr. Klein finish.

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MR. APPLEBY: I'm sorry, Mr. Klein. Go ahead.

THE COURT: Don't get ahead of yourself.

MR. KLEIN: I would like to hear the last answer that his Honor asked because you got up at that point and I lost it as you were getting up.

THE COURT: I had asked him, absent the knowledge of the parties involved would his answer be the same.

MR. KLEIN: And he said no?

THE COURT: That's what he said.

MR. KLEIN: I have no further questions then.

THE COURT: Yes.

BY MR. APPLEBY:

Q I show you again a transcript of the April 10th conversation, and on that conversation is Mr. Rosenberg's voice, right?

A Yes, sir.

Q And he is talking to another individual?

A Yes, sir.

Q Excuse me, I have the wrong transcript.

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Mr. Rosenberg is asking -- he is calling up a certain number. Is that correct?

A That's correct, sir.

Q And he says, isn't this 773-0268; and then he gets a wrong number and then he calls another number. Is that correct?

A Yes.

Q And he gets a place called Exclusive Motors?

A Yes, sir.

Q And he says, Joe Setter, please, and an unknown male says, hold on, please.

And then there is a hello by an individual and Mr. Rosenberg says, Joe Setter.

A Yes, sir.

Q And what is the response?

A Yes -- yeah.

Q Okay.

Now, you have heard this conversation?

A Yes, sir.

Q And you have compared it to the April 17th Kel conversation?

A Yes, sir, I did.

Q Is it the same individual on that recording as on this recording?

A I believe so, yes.

MR. APPLEBY: Thank you.

THE COURT: Yes, Mr. Klein.

MR. KLEIN: Nothing further.

THE COURT: Okay.

Thank you. Step down, please.

(Witness excused.)

MR. APPLEBY: Your Honor, at this time the Government calls Robert Richel.

R O B E R T R I C H E L, sworn.

THE CLERK: State and spell your name for the reporter, please.

THE WITNESS: Robert Richel, R-i-c-h-e-l.

THE CLERK: Would you speak up so the last juror can hear you.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. APPLEBY:

Q Sir, by whom are you employed?

A The Drug Enforcement Administration, the United States Department of Justice.

Q You are a special agent?

A Yes, sir.

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Q How long have you been so employed?

A A little less than seven years.

MR. KLEIN: Excuse me, sir; 3500 material?

MR. APPLEBY: With respect to 3500 material, there is no 3500 material with respect to this witness.

MR. KLEIN: I'm sorry, your Honor.

THE COURT: That's all right, that's all right.

Q Do you know Joseph Setter?

A Yes, sir.

Q Would you point him out.

A The gentleman with the blue suit on.

MR. APPLEBY: Indicating the defendant, your Honor.

THE COURT: Yes, all right, indicating the defendant.

Proceed.

Q Do you know one Harvey Rosenberg?

A Yes, I do.

Q And Harvey Rosenberg was an informant working with the Task Force. Is that correct?

A That's correct.

Q Did there come a time when you met Mr. Rosenberg on April 10th, 1975?

A Yes, sir, I did.

Q Where did you meet Mr. Rosenberg?

A At his place of employment in Brooklyn.

Q Who were you with at that time?

A Investigator Jerry Boss.

Q Tell us what -- well, approximately what time was that?

A In the afternoon, between, I believe, 2:00 and 4:00 P.M.

Q All right.

Now, what occurred at that time?

MR. KLEIN: I will object to this, your Honor, as hearsay.

THE COURT: Sustained.

MR. APPLEBY: I am asking what was done, your Honor.

THE COURT: I will have to take it at side bar to see exactly what it may be, if at that point it's admissable. But the objection is sustained.

MR. APPLEBY: I am not asking what anybody said, your Honor.

Can I have a side bar?

THE COURT: I will take it at side bar.

(The following takes place at side bar out of the hearing of the jury.)

MR. APPLEBY: Your Honor, I do not intend to ask about any hearsay declaration. All I am going to ask is how the recording was made. I am only setting a foundation for the recording.

THE COURT: All right.

I will permit it.

(The following takes place in open Court and in the presence of the jury.)

BY MR. APPLEBY:

Q Could you tell us what was done at Mr. Rosenberg's place of employment?

A Yes, sir. Mr. Rosenberg placed a telephone call to Mr. Setter in our presence.

MR. KLEIN: I will ask that that be stricken. There is no foundation. There is no proof of that whatsoever.

MR. APPLEBY: Proof of what?

THE COURT: One minute.

MR. KLEIN: That's not what you told us at the side bar.

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MR. APPLEBY: Your Honor --

Q Was there any preparation made before he actually made that telephone call?

A Yes, sir.

Q Would you tell us what the preparations were.

A Yes, sir.

We placed a recorder on Mr. Rosenberg's telephone, anticipating a call from Mr. Rosenberg to Mr. Setter.

Q What kind of recording device is this?

A Just a cassette recorder.

Q A what?

A A cassette tape recorder.

Q And what does that cassette tape recorder do with respect to telephone conversations?

A It monitors both parties on the phone.

Q And there came a time Mr. Rosenberg placed a telephone call. Is that correct?

A That's correct.

Q Who did he place the telephone call to, which number?

A I have to refresh my memory, but it was Mr. Setter's place of business.

Q I show you this transcript and ask you

whether it refreshes your recollection.

A Yes, sir.

Q Where was the telephone call placed to?

A The telephone number.

Q Well, what was that telephone number?

A Mr. Setter's place of employment in Brooklyn.

Q And what occurred at that time?

A The first time Mr. Rosenberg misdialed, got a wrong number.

Q Right.

A Then he redialed and he spoke with Mr. Setter.

MR. KLEIN: Again I ask that that be stricken as not responsive.

THE COURT: It's stricken as not responsive.

Q Did there come a time a recording was made of that telephone conversation, in other words, when you retrieved a recording from the cassette.

A Yes, sir.

Q Did there come a time you heard that recording?

A Yes, sir.

Q Was that recording a fair and accurate representation of what you heard at Mr. Rosenberg's

place of employment?

MR. KLEIN: I object. He only heard one side of the conversation. There is no proof that he heard the other side of it.

MR. APPLEBY: Your Honor, I think that --

THE COURT: I think he heard the whole thing. I think he heard the whole thing. Didn't he hear the whole thing?

MR. APPLEBY: May I have a side bar again?

THE COURT: Side bar.

(The following takes place at side bar out of the hearing of the jury.)

MR. APPLEBY: Your Honor, the agent was present with Mr. Rosenberg. He heard everything that Mr. Rosenberg said. He did not hear what the defendant was saying. However, after the conversation the cassette was retrieved and when he heard the cassette it conformed to exactly what transpired in his presence with respect to what Mr. Rosenberg said. So there is an adequate foundation there obviously for the recording.

MR. KLEIN: Only about Rosenberg.

THE COURT: The response from the other end was picked up on a cassette?

MR. APPLEBY: Yes, your Honor. That's what the recording does.

MR. KLEIN: This is like somebody eavesdropping, a third party. If Mr. Appleby is talking to you on the phone and I don't see you, I don't know wh: you said.

And, Judge, I am over here and he can say Mr. Appleby was talking about Judge Bramwell.

MR. APPLEBY: There was a recording made.

MR. KLEIN: But that doesn't prove it's Judge Bramwell.

THE COURT: What authority do we have for getting this -- these statements in in this fashion?

MR. APPLEBY: United States v. Bonnano, that's one case I would site as authority. This is standard procedure. This occurs all the time in investigations. There is nothing unusual about it.

MR. KLEIN: I don't know of any such thing.

MR. APPLEBY: This is a standard

investigative technique and there is nothing unusual. It's introduced in evidence time and time again. The reliability is not in question here. He placed the recording device on the telephone and heard the cassette immediately afterwards and everything he heard was accurate and represented on the recording as well as on the transcript.

MR. KLEIN: How many people work at that place? 20 of them?

THE COURT: We don't have Mr. Rosenberg to get this in. This is an informant.

MR. APPLEBY: He calls up, your Honor, and he says, Joe Setter. And Joe Setter identifies himself.

THE COURT: Maybe I'd better take a short adjournment.

MR. APPLEBY: Mr. Klein can always say anybody can say Joe Setter.

MR. KLEIN: That doesn't make him Joe Setter.

THE COURT: I will take a short adjournment. We will go to lunch and after lunch we can resume on this. It's almost 12:30.

Is that all right?

MR. KLEIN: Whatever you say.

THE COURT: You will give me the authority on it?

MR. APPLEBY: I will ask you to look at United States v. Bonnano first.

THE COURT: All right.

We will take a short lunch.

(The following takes place in open Court and in the presence of the jury.)

THE COURT: Ladies and gentlemen, we will take a short adjournment and we will include it with the luncheon adjournment and you may return to the Court at 2:00 o'clock.

You may leave now and come back at 2:00.

Please do not discuss the case with anyone on or off the jury.

The jury may leave.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

MR. KLEIN: Would you please give the same instruction to the witness not to discuss

AFTERNOON SESSION

(The following takes place out of the presence of the jury.)

MR. APPLEBY: Your Honor, I have done some research, as much as I could during the luncheon. And as far as the identification of the defendant on the telephone, the cases are legion that circumstances as this would call for admissibility, and as a matter of fact, I look at the Federal Rules of Evidence itself.

THE COURT: Yes; identification.

MR. APPLEBY: Yes.

THE COURT: Identification is separate from this man.

MR. APPLEBY: I'm sorry, I don't follow you.

THE COURT: Is Mr. Richel going to do the identification?

MR. APPLEBY: Yes. I talked with Agent Richel during the lunch break and he said he interviewed the defendant for two and a half hours during the arrest process and he has listened to the defendant on other tapes and there is no problem with the identification.

THE COURT: Do you understand this, Mr. Klein?

MR. KLEIN: No, sir.

THE COURT: It's the intent of Mr. Appleby to make an identification of the voices on the tapes for the purpose of admissibility.

MR. KLEIN: I know that's Mr. Appleby's intention, and I don't think he has done it so far.

THE COURT: I know that. But I am telling you what he intends to do. That will be his way of laying a foundation for the introduction of the tapes.

Anything you have to say as to this?

MR. KLEIN: No. He was attempting--Mr. Appleby was attempting that this morning also.

THE COURT: No, I don'tthink he was attempting that.

MR. APPLEBY: I didn't get to the identification of the voice yet.

THE COURT: He didn't get to the identification.

MR. KLEIN: You lost me there somewhere.

THE COURT: Did you look at the problem

when you were out during lunch time?

MR. KLEIN: I didn't have any facilities.

THE COURT: I see.

There is a library in this building.

MR. KLEIN: I didn't know that.

THE COURT: It's available for your use if you want to use it.

MR. KLEIN: Is that so? I didn't know that. Where is it?

THE COURT: It's on which floor?

THE CLERK: Fourth floor.

MR. KLEIN: Thank you very much.

You know, in all the years I have been here, I didn't know that.

THE COURT: It's quite an adequate library.

MR. KLEIN: I imagine it would be.

THE COURT: Well, under those circumstances I would admit it.

MR. KLEIN: Under what circu cances?

THE COURT: Under the circumstances Mr. Appleby intends to oroceed in.

MR. KLEIN: I don't quite follow. I don't know what Mr. Appleby's evidence is going to be.

THE COURT: Give him an offer of proof, Mr. Appleby.

MR. APPLEBY: Yes.

Agent Richel is going to testify that he knows the defendant Setter's voice very well because he interviewed him for two and a half hours after his arrest when they were talking about cooperation, and he has heard his voice at other times and he has heard the two other tape recordings in this case. He has compared the voice on the tape recordings and the voice he knows from the conversations with, and compared his voice to the April 12th, 1975, telephone conversation, and in his opinion it's the same voice. And based on that and based on the Federal Rules of Evidence that permits such identification, the Government would move it into evidence.

MR. KLEIN: I would object to it because there is a comparison of voice--of person to person voice, there is telephone tapes. And then you have this Kel transmission which is a very poor quality, in my opinion. And I don't think it lends itself to a possible

identification.

THE COURT: If he lays the proper foundation, I would permit Mr. Appleby to introduce the evidence.

MR. KLEIN: And if it goes that far and your Honor feels that Mr. Appleby has proven it to your satisfaction, the identification, would you then later on instruct the jury it would still be an issue of fact for them as per the identification?

THE COURT: Yes, that's true; that would be true.

MR. KLEIN: It would be an issue of fact for the jury to consider in their deliberations as to the mere identity.

MR. KLEIN: Yes, merely because you decide as a matter of law that the foundation has been laid shouldn't preclude the jury from determining it wasn't Mr. Setter.

THE COURT: Yes. You're perfectly correct and proper in what you say. The fact that the tape has been introduced in evidence and received by the Court does not preclude the jury from determining that they don't believe

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that that was the voice. That's true.

MR. KLEIN: Right.

If your Honor does decide, would you then give that instruction at the time you admit the tape into evidence?

THE COURT: Yes, I can give it at that time.

MR. KLEIN: All right, sir.

THE COURT: Surely.

MR. KLEIN: Are you going to put Mr. Richel on the stand?

THE COURT: Yes, Mr. Richel will probably return to the stand, I imagine.

Is that right, Mr. Appleby?

MR. APPLEBY: Yes, sir.

THE COURT: Ready to proceed?

MR. APPLEBY: Yes, sir.

THE COURT: Bring in the jury.

MR. KLEIN: We are proceeding on that point now?

THE COURT: It was where we ended.

MR. KLEIN: Yes. On that offer of proof just now?

THE COURT: Yes. Just what was before the

Court just now. That's the issue.

MR. KLEIN: Yes, sir.

THE COURT: Is Det. Copeland to be a witness again?

MR. KLEIN: Yes, he will be a rebuttal witness, your Honor.

THE COURT: Any of the other officers to be witnesses?

MR. APPLEBY: Just Det. Copeland.

THE COURT: Any witnesses you have here?

MR. KLEIN: Yes, a police officer, Mr. Restivo, who will be a character witness. The timing is off.

THE COURT: Maybe you better have him wait in the witness room.

MR. APPLEBY: I have no objection.

THE COURT: All right, he can stay here.

All right, bring in the jury.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

R O B E R T R I C H E L, previously sworn, resumes the stand and further testifies as follows:

DIRECT EXAMINATION (Continued)

BY MR. APPLEBY:

EXCERPTS FROM TRIAL TESTIMONY - ROBERT RICHEL (cont'd)



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Q Agent Richel, I believe you testified you were present in Mr. Rosenberg's place of business when you made this recording. Is that correct?

A That's correct.

Q And Mr. Rosenberg consented to this, of course?

A Yes, sir.

Q And raised no objection to this procedure?

A None at all.

Q Now, there came a time you retrieved a cassette recording based upon your monitoring of that telephone conversation. Is that correct?

A Yes.

MR. APPLEBY: I would ask this cassette be marked as the Government's next exhibit for identification.

THE COURT: Mark it for identification.

THE CLERK: One cassette tape marked Government's Exhibit #23 for identification.

(So marked.)

Q Agent Richel, I show you Government's 23 for identification and ask you whether you recognize it.

(Handed to the witness.)

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A Yes, sir, I do.

Q What do you recognize it to be?

A The original recording, cassetta recording of Mr. Rosenberg's telephone call.

Q To whom?

A Mr. Joseph Setter.

Q How do you recognize it?

A By the date and my initials.

Q You heard this recording?

A Yes, sir.

Q Is it a fair and accurate representation of the telephone conversation that you heard?

A Yes.

Q Now, have you seen a transcription of this recording?

A Yes, sir, I have.

Q And have you compared the transcription to the recording?

A Yes.

Q Is the transcription a fair and accurate reflection of what is in the recording?

A Yes, it is.

MR. KLEIN: I will object to this line of questioning. We are talking about something

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that's not in evidence.

THE COURT: He is talking about it, but he is not reading from something. He is just talking about it.

Objection overruled.

MR. APPLEBY: I would ask this transcript be marked as the next Government's Exhibit for Identification.

THE CLERK: A 7-page transcript marked as Government's Exhibit 24 for identification.

(So marked.)

Q Agent, I show you Government's 24 for identification and ask you whether you recognize it.

A Yes, sir.

Q What do you recognize it to be?

A A copy of the transcript of Exhibit--of the cassette recording between Mr. Rosenberg and Joseph Setter.

MR. APPLEBY: Your Honor, I offer Government's 23 and 24 in evidence.

THE COURT: Mr. Klein.

MR. KLEIN: May I question him on it?

THE COURT: Sure.

You want some voir dire?

MR. KLEIN: Yes.

THE COURT: Surely.

VOIR DIRE EXAMINATION

BY MR. KLEIN:

Q This is April 10th?

A Of what, sir?

Q What is the date of that telephone conversation?

A April 10th.

Q And were you sitting in the presence of Mr. Rosenberg when he made the call?

A Yes, sir.

Q Did you have a telephone instrument to your ear?

A No, sir.

Q You only heard one side of the conversation?

A That's correct.

Q Who was the number that was dialed?

A Pardon?

Q Who was the number?

A Mr. Setter's--the number that Mr. Rosenberg dialed?

Q Yes.

A Mr. Setter's place of employment.

Q Do you know the name of the place of employment?

A I can't recall. It's in Brooklyn.

Q Exclusive Motors, maybe?

A Exclusive Motors.

Q Do you know how many employees there are there?

A I have no idea.

Q Do you know how many bosses there are there?

A I have no idea.

Q How many male personnel there are there?

A No, sir.

Q You didn't hear the other end of the conversation?

A Other than listening to the cassette, no.

Q We are not at the cassette yet. We are just at Mr. Rosenberg's end.

A No, sir.

Q When did you hear the cassette?

A When the telephone conversation was terminated.

Q Then you played it back?

A Yes.

Q And at that time had you met Mr. Setter yet?

A Personally, no.

Q When did you first meet him?

A Personally? The date of his arrest, sometime in---

Q July 3rd?

A Correct.

Q And this conversation was before that, it was April 10th. Is that right?

A Yes, correct.

Q Did Mr. Setter know or did the other person who was on the telephone know that Mr. Rosenberg had put a tap on it?

A Did the other person?

Q Yes.

A I don't follow your question.

Q Did Mr. Rosenberg say to the other party on the other end of the line, "I am taping everything you say"?

A No, sir.

Q When you say Mr. Rosenberg didn't object, when you suggested making a taped telephone conversation weren't you aware at the time that Mr. Rosenberg had been arrested for narcotics violations himself previously?

A Yes, sir.

Q And that he had bargained with the United States Attorney and with your group of law enforcement officers that in return for rendering cooperation in helping break cases, make cases, that he would receive consideration from his sentencing judge on sentence day?

A Yes.

Q And for how long a period had Mr. Rosenberg been acting as informant?

A I would say approximately a little less than a year.

Q At that time, April 10th?

A I believe so.

THE COURT: This is on the tape, Mr. Klein, you are voir diring at this point.

MR. KLEIN: Yes, you're right, your Honor.

THE COURT: Yes, I understand.

MR. KLEIN: Thank you for reminding me. I was going into cross.

THE COURT: Perfectly all right. Nothing wrong at all.

Q And what was the reason you gave that you could identify the voice at the other end of the telephone conversation as that of Mr. Setter?

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A What was the reason, sir?

Q Yes.

A In other words, how did I come to that conclusion?

Q How do you know the other voice on the cassette was Mr. Setter's?

A Numerous reasons. After listening to the cassette recording, Mr. Rosenberg asked for Mr. Setter. An unidentified male said, hold on. Approximately two minutes went by while he was on hold. Another male voice picked up the phone and said hello.

Mr. Rosenberg said, Joe Setter, in the question form. And the reply was yes.

MR. KLEIN: Your Honor, at this time I respectfully---

THE COURT: One minute.

If you want to make a motion, make it.

MR. APPLEBY: I have a few more questions on the foundation, your Honor.

THE COURT: On foundation?

MR. APPLEBY: Yes.

THE COURT: I will let him put in his few more questions on foundation.

MR. APPLEBY: I neglected a few questions.

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DIRECT EXAMINATION (Continued)

BY MR. APPLEBY:

Q After you interviewed the defendant for a period of time, about two and a half hours?

A Yes.

THE COURT: When was this?

MR. APPLEBY: The time of his arrest.

THE WITNESS: The time of his arrest.

THE COURT: This is July?

THE WITNESS: July 3rd.

THE COURT: He interviewed him?

MR. APPLEBY: Yes, your Honor.

THE COURT: How long a period did you interview him?

THE WITNESS: Approximately two, two and a half hours.

THE COURT: Mr. Appleby, continue.

Q And did you hear the cassette subsequent to his arrest?

A Yes, sir.

Q And have you compared in your own mind the cassette, the voice on the cassette with that of the person you interviewed?

A Yes.

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Q And what conclusion did you draw?

A That Mr. Setter was the person on the phone identified as Mr. Setter on the phone with Mr. Rosenberg.

THE COURT: Mr. Klein.

MR. KLEIN: I would like to make a motion, your Honor.

I object to the introduction into evidence of this cassette upon the grounds that there was an improper foundation being laid. The witness has testified--

THE COURT: All right, I will take your objection. Your objection is overruled. The Court will receive--what is it, the tape?

MR. APPLEBY: Yes, the tape.

THE COURT: The tape and transcript into evidence.

The jury is instructed that even though the Court is receiving this into evidence, it will be their hearing and their sensing of what is made as to whether or not the jury actually believes that this is the defendant at that time who is speaking. But it is received into evidence A proper foundation has been laid by the Government.

You may proceed, Mr. Appleby.

THE CLERK: Government's Exhibit #23 and 24 previously marked for identification received in evidence.

(So marked.)

MR. APPLEBY: Your Honor, may I pass out the transcripts and play the tape?

THE COURT: Yes, you may.

(Whereupon the transcripts referred to are passed out amongst the jury.)

(Whereupon the cassette recording referred to is played.)

MR. APPLEBY: One other question, your Honor.

BY MR. APPLEBY:

Q Agent Richel, do you know how far Exclusive Motors is from Mr. Setter's residence, 54-16 Glenwood Road?

A About five minutes by car.

MR. APPLEBY: I have no further questions--I'm sorry, your Honor, I would like a side bar for a moment.

THE COURT: I'm sorry?

MR. APPLEBY: I would like to have a side

bar for a moment.

THE COURT: Sure.

(The following takes place at side bar out of the hearing of the jury.)

MR. APPLEBY: Your Honor, I would like to ask Agent Richel about some of the terminology in the transcript. My authority for asking those questions is the case of the United States of America v. Eduardo Borrone-Iglar, the official citation is 468 Fed 2d 419.

There the Court has stated that it was proper to permit Detective Cruet to testify concerning the narcotics vernacular used in their telephone conversations. The objection was not that the officer was unqualified by lack of experience or objectivity to give an opinion, but the opinion testimony should not be received on meaning of word used in conversations. This objection is unavailing, citing a case. The testimony of a duly qualified expert is admissible to explain the significance of cryptic letters and figures which appear

upon paper, books, and paraphernalia customarily used by bookmakers.

That's basically it, your Honor.

MR. KLEIN: It's a different situation.

MR. APPLEBY: This is a narcotics case. It was a case tried by Judge Weinstein and it was a procurium opinion by the Court of Appeals.

THE COURT: I will take a short adjournment and look at it. I think that's best. Let me look at it. Just about ten minutes or so.

MR. KLEIN: Okay.

(The following takes place in open court and in the presence of the jury.)

THE COURT: The Court will take a ten minute adjournment. The jury may leave.

Please do not discuss the case.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: Don't discuss your testimony with anyone.

(A recess is taken.)

(The following takes place out of the presence of the jury.)

THE COURT: Mr. Appleby, as to the translation you intend to get from this witness, would you give the Court an offer of proof what you intend to elicit from this witness.

MR. APPLEBY: I intend to ask Agent Richel whether, first of all, when the narcotics dealers talk about their actions openly on the telephone as a starter, and then I would ask him, do they use code words, and this sort of thing.

And I will ask him if on the April 12th conversation which he monitored--of course, I will lay a foundation for these things. And then I will ask, did you notice any code words used in the conversation. And then I will expect the Agent to testify when they are referring to $4800 for a package of slacks, they are not really talking about slacks, but they are talking about a cocaine deal.

And then there is some other terminology, if you just give me a moment, your Honor.

THE COURT: Surely.

MR. APPLEBY: And then I will go through the transcript and I would say about the cut, it says at one point inaudible, Harvey, the pants that I showed you, that will be I am telling you something, the pants I showed you would be the same cut, the same identical fucking thing as before.

And then I would ask, in your experience what are they talking about there.

And he would say the cut refers to the way cocaine dealers dilute the cocaine for the purpose of selling or making more profit.

And then I would go to the other two conversations which Agent Richel is familiar with and ask for the terminology there.

THE COURT: Which two conversations?

MR. APPLEBY: Take the Kel set, for instance, your Honor.

THE COURT: Then you're going to go to terminology in that particular situation?

MR. APPLEBY: Yes. This is not going to be too lengthy, but just a few key things like cut.

THE COURT: Which is the other conversation?

MR. APPLEBY: That's Government 22 in evidence, the Kel set recording between Rosenberg and Setter, and that's on April 17th. And then there was a conversation between Det. Copeland and Setter. And there they are talking about--there Copeland is complaining about the cocaine.

THE COURT: Yes.

All right, Mr. Klein.

MR. KLEIN: I would certainly object to it and on the grounds that the best evidence is what was spoken, and the transcript speaks for itself and the tapes speak for itself. I don't think this is similar to a bookmaking case where the police officer testified and qualifies himself as an expert and shows expertise in the field of gambling, bookmaking, and then he testifies as to paraphernalia and marks and names of horses and bets or betting slips.

In other words, in that situation we have a number, we have three numbers, 175, and he would say what is 175. The numbers itself are innocuous, but if it's on a slip of paper he would say that's how numbers are made and the

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pencils are used to make notations and the scratch sheet is to get entries from.

Now, in this particular case we don't have that. We have here--it has to be established that Mr. Setter is a narcotics dealer. That's number one.

And number two, we have words in here which speak for themselves. The Agent was wired--not the Agent, the informant was monitored. He moritored the conversation. And if there is anything that had a double meaning, he should have brought it out. And since he didn't, the conversations should stand as it is. And I certainly object to an interpretation of words which may or may not have been in somebody's mind when he spoke.

THE COURT: The objection is overruled and the Court will permit the vernacular to be translated by the witness provided a proper foundation is laid. And the Court's authority is the United States of America v. Eduardo Borrone-Iglar, which is at 468 Fed 2d 419.

I would permit the translation of the vernacular from the transcript.

Colloquy





MR. APPLEBY: I willbe brief, your Honor, with respect to this.

THE COURT: Ready to proceed?

MR. KLEIN: Yes, sir.

THE COURT: Bring in the jury.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

THE COURT: All right, you may proceed, Mr. Appleby.

MR. APPLEBY: Thank you, your Honor.

BY MR. APPLEBY:

Q Agent Richel, you have been an agent for how long?

A A little less than seven years, sir.

Q Are you familiar with the jargon and vernacular that narcotics users employ?

A Yes, sir.

Q Tell us briefly how you come to know that vernacular and jargon.

A For the past seven--six and a half, six, seven years I have worked in undercover capacity many times in which you speak directly to narcotic traffickers and you have to talk their language to be accepted.

Q Now, in your experience when narcotic dealers have conversations over the telephone, do they talk explicitly about the narcotic and what the purpose of the money is?

A No. They always shield the conversation.

Q How do they do that?

A By using different terms in reference to narcotics

Q Code words, things like that?

A Code words.

Q Did you notice any code words in the April 10th telephone conversation?

A Yes, sir.

Q Could you tell the members of the jury what you found those to be.

A Yes, sir.

Slacks. Slacks is a street term for a package of narcotics, whether it be cocaine or heroin.

Pants, the same thing for the word pants.

Cut---

Q What does "cut" mean?

A Cut is a term to define the quality of the narcotics, how it's diluted.

MR. KLEIN: You didn't mean heroin, did you?

THE WITNESS: Narcotics.

MR. KLEIN: I thought he said heroin.

THE COURT: I didn't hear it.

Did you say heroin?

THE WITNESS: I might have.

THE COURT: He said he might have.

Q Do you see any other kind of jargon that a narcotics dealer may use?

A Yes.

It says if the slacks are not the size that he wants, that refers to the cut, the size.

Q Yes.

A Slacks, slacks, it's all the same.

Q Now, there is reference at the bottom of Page 4, the very bottom of the page, where it says, swear by it, I am trying to give you confidence, but I know you can't, you don't have confidence until it happens; and Harvey Rosenberg says, Joe, I got confidence in you.

What are they talking about here?

MR. KLEIN: Your Honor, this is not a term of art.

THE COURT: It is not.

Objection sustained.

Please don't answer that question.

Q Agent Richel, I am going to hand you copies of Government 22 and 6, which are in evidence. And Government 22, since yours are not marked, has on the top, recorded conversation between SCT, the number, and Joseph Setter, monitored by P.O. Ryan; you have that with you?

A Yes, sir.

Q Can you go through that and see if there is any other jargon?

Especially on Page 2, there is a reference to the old triple beam. That's Rosenberg.

Now, what is the triple beam?

A It's a very accurate scale that is used in the narcotics business.

Q And how is it used?

A To weigh accurately narcotics.

Q Now, on Page 2 Setter says, I got a little more than 126 and two packs, you know.

Now, what would that refer to?

A 126 is in reference to grams. There is 125 grams in an eighth of a kilo of narcotics. So an eighth of a kilo is 125 grams. Here he is saying it's 126.

Two bags is just like two nickel bags, which is five dollar bags.

Q Now, Rosenberg says, what have you got, a double wrap here or what, Joe.

What is a double wrap?

A A double wrap is the narcotics are placed in a container and then that entire container is placed into another container, therefore it's double sealed.

Q Now, there is reference throughout the transcript to key, k-e-y. What is that?

A 2.2 pounds of narcotics--oh, a key is in reference to a kilo.

Q A kilogram?

A That's right.

Q Look at Page 4.

A Yes, sir.

Q Setter says, I wouldn't even be talking weight if I didn't know you. I don't deal with nobody. I deal with quarters, halves.

See what I am talking about?

When I say quarters and halves I am talking about a half a key or quarter a key.

What is that referring to?

I'm sorry, this is the recorded con-

A-915

versation--let me show it to you.

A Yes, it says I wouldn't be talking weight if I didn't know you. In other words---

MR. KLEIN: Your Honor, that seems to be pretty clear. That's not a different term.

THE COURT: It is clear.

The objection is sustained.

Q Referring to the next sentence, I deal with quarters, halves, see what I am talking about when I say quarters and halves, half a key and quarter a key, that's a kilo again?

MR. KLEIN: That's self-explanatory, your Honor.

THE COURT: Yes, it seems to be.

Q There is a reference, of course not, I understand you're not talking spoons, you are not talking grams.

What are spoons?

A Spoons are--it's a quantity of narcotics that are sold strictly to users. It's a minute quantity. It's approximately, I think, 2 grams to a spoon.

Q Turning to the next page, sir, there is a reference to--about three quarters of the way down Rosenberg says, what do you think the man in the street--then it trails off.

A-416

Do you have that?

A No.

Q About three quarters of the way down on the page?

A Yes.

Q Who is the man in the street?

A Det. Copeland.

MR. APPLEBY: Your Honor, I have no further questions of the Agent.

However, at this time I offer Government's 1 in evidence.

MR. KLEIN: 1?

MR. APPLEBY: Yes.

MR. KLEIN: I certainly object to that, your Honor. He hasn't proved a sale.

THE COURT: It appears a proper foundation has been laid. It's received in evidence on behalf of the Government.

Mark it.

MR. KLEIN: May I respectfully point out the transcript that just came in is an April 10th transcript and we are now talking about April 17th when the sale to--by Harvey Rosenberg is made. And nobody has proved that Mr. Setter made the

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sale. A-417

THE COURT: The Court finds enough for the introduction of this in evidence, enough foundation for the introduction in evidence; and it's received.

THE CLERK: Government's 1 previously marked for identification is received in evidence.

(So marked.)

THE COURT: Cross-examination by Mr. Klein.

CROSS-EXAMINATION

BY MR. KLEIN:

Q If you weren't sitting with Harvey Rosenberg on April 10th when he taped that telephone call to Exclusive Motors, and you just heard a tape at some later time, that tape, honestly would you be able to say that the voice on the other end was Joseph Setter?

A That's hard to say.

Q If you didn't know?

A And I never spoke to Mr. Setter again, you mean?

Q No, no, no. If you weren't there at that time.

A Right.

Q And the tape was played?

A-418

A Yes.

Q This tape we are talking about, the tape of April 10th, you weren't there when it was made?

A Right.

Q And when the telephone conversation was made, could you by merely listen to the tape identify the voice on the other end as that of Joseph Setter?

A No, definitely not without speaking to Mr. Setter.

Q Were you there on July 3rd, were you part of the surveilling team?

A The arrest, sir?

Q Yes, the arrest.

A No, sir, I wasn't.

Q Were you in the car with Agent Ebert when he took Mr. Setter with him?

A Where sir?

Q Downtown on the arrest.

A No, sir, I wasn't.

Q Before I strayed, I went beyond what I was supposed to do in the voir dire and I delved into cross-examination and I was asking you about Harvey Rosenberg, the informant.

You said he was an informant for around a

A-419

year, up to April 10th?

A I believe so.

Q Right.

And was it part of his function to introduce suspected narcotics offenders to members of your group?

A Yes, sir.

Q And was it part of that function so that a buy can be arranged and set up?

A Yes, sir.

Q And when I say a buy, I mean a purchase of narcotics.

A From---

Q From the suspected---

A From the suspected narcotics office to an agent?

Q To an undercover officer?

A That's correct.

Q Did Harvey Rosenberg do that over a period of time?

A Yes, sir.

Q Various incidents?

A Yes, sir.

Q Other incidents, other than Joseph Setter?

A Yes, sir.

Q Did it come to your knowledge at that time that Harvey Rosenberg was having difficulty to persuade, persuading Joseph Setter to meet Det. Copeland?

A Could you say that again, sir?

Q Yes.

Did it come to your knowledge that Harvey Rosenberg was having difficulty persuading Joseph Setter to meet Mr. Copeland--Det. Copeland?

A Yes, sir, correct.

Q And who told you that?

A Well, Mr. Rosenberg and then from listening to the conversation on April 10th it was obvious that Mr. Setter didn't want to meet anybody.

Q And Mr. Setter was given instructions to go back---Mr. Rosenberg was given instructions to keep trying, keep trying to get Mr. Setter to meet with Det. Copeland so that a buy can be set up?

A Was Mr. Rosenberg given instructions?

Q Yes.

A After this conversation we decided to let Mr. Rosenberg make the purchase and then just play it by ear then to see if Mr. Setter would then meet Det. Copeland.

Q In other words, he was instructed to keep trying to get Mr. Setter to eventually have enough confidence in him so when he's introduced to Mr. Copeland he would do business with Mr. Copeland?

A Yes.

Q And all along you knew that there was resistance on the part of Mr. Setter?

A Not all along, sir, no.

Q Did you know it at that time?

A In the beginning, yes.

Q And you knew it until he finally arranged to meet with Mr. Copeland?

A After the first purchase.

Q And up to that point--do you know for how long a period of time Mr. Rosenberg was negotiating with Mr. Setter?

A Prior to the phone call, for example?

Q Yes.

A No, I don't.

Q When Mr. Rosenberg consented to take this conversation with Mr. Setter at that time on April 10th, would you say that was part of his duty of cooperation that he had bargained for?

A Yes.

A-422

Q To your knowledge had Mr. Rosenberg ever been paid any money for acting as an informant?

A No, sir.

Q You said it's only five, five minutes from Mr. Setter's place of business to his house?

A Five to ten minutes by car, yes.

Q Are you sure it's not something closer to a half an hour?

A No.

Q When did you speak to Mr. Setter in person?

A On the day of his arrest.

Q And were you the only one who spoke to him at that time?

A No, sir.

Q Weren't there six or seven agents around him at all times there?

A At all times?

Q In and out?

A In and out.

Q Were you in and out part of the time?

A Part of the time.

Q Right.

And before you told us--how long did you say you had spoken to him?

A Approximately two, two and a half hours.

Q Were you in his constant company on that day?

A Constant company I would say ninety minutes to two hours. And then it was like a half an hour, forty-five minutes that I was back and forth from our office to the interview room processing part of the evidence or supervising it.

Q Did you notice in that telephone conversations that the portions which Harvey Rosenberg spoke were long sentences, whereas a number of the responses given by Mr. Setter were like one syllable words, words like, uh, uh-huh, you have it written out in the transcript as uh and uh-huh?

A Yes, the first two pages.

Q By the way, did you suggest to Mr. Rosenberg what to say in that conversation?

A Did I suggest?

Q Yes.

A Not really.

Q Did you tell him what to talk about, what subject matter?

A No. Before the phone call was placed Mr. Rosenberg and I had a conversation. And he told me

Q Strike that.



A-424

what basically he was going to talk to Mr. Setter about. And the only instruction I could remember giving him is when the person answers the phone, try to have the person identify himself.

Q And what Mr. Rosenberg told you was satisfactory of what he was going to say?

A Yes.

Q And that's substantially what appears on that transcript or on the tape?

A Yes.

Q What Mr. Rosenberg said he was going to say. Is that right?

A In other words, he and I discussed before was basically on the transcript, yes.

Q And in your opinion wasn't that conversation that he was going to say, wasn't that designed to evoke certain responses from Mr. Setter, certain incriminating responses from Mr. Setter?

A Not in my mind, not to envoke incriminating statements. It was designed to set up a narcotic transaction in the near future.

Q And when Mr. Rosenberg said something about $4800, the part that fit, the cut and the size, whatever it is, wasn't that designed to invite

officer.



a response pertaining to that same subject matter?

A In the particular matter that you mentioned, that was to try to see if Mr. Setter would accept meeting Det. Copeland. And I say this because Mr. Rosenberg told Mr. Setter Det. Copeland wanted to be in the area because if the pants--meaning the package of narcotics--wasn't of a good quality, he wouldn't want to have to come all the way back. In other words, Det. Copeland was up in Harlem or up in Manhattan. Mr. Setter wanted Harvey Rosenberg to come by himself and Harvey said no, Det. Copeland wants to come with him because if the package is good, they can bring it up.

Q What I am saying, and I think we are in agreement, that the particular phrasiology of the questions, the particular questions themselves that Mr. Rosenberg discussed with you and you approved, those questions were designed, were they not, to provide responsive answers as to the same subject matter?

A In a certain way I guess you're right, yes.

Q What I am trying to say, if I asked you, is today Thursday, I would expect your answer to be yes, so I know we are talking about Thursday, about today.

A I understand.

A-426

In that case, no. I didn't direct him to ask specific questions. We went over a subject matter and it was up to Mr. Rosenberg to ask questions that pertained to it.

Q Right.

Were his questions satisfactory to you?

A Yes.

Q And they satisfied your purpose?

A Yes, sir.

Q Your intent?

A Yes.

Q Which is what? What was your intent insofar as Mr. Setter was concerned?

A To see if Mr. Setter would be agreeable to selling a package of narcotics.

Q Right.

So then when Mr. Rosenberg asked questions which were satisfactory to you, those questions were designed so as to invite an answer which was responsive to the question?

A Yes.

Q I think on the tape didn't Mr. Setter say, "I don't deal with anyone or nobody," or something like that?

A-427

A I would have to look it over again.

Q Did you notice at the end of the first page of the transcript they practically said good-bye?

A May I see the transcript again?

Q Sure.

(Transcript referred to is handed to the witness.)

A Do you see the part where it says SCT?

Q That's Rosenberg, isn't it?

A Yes.

Q Rosenberg says, are ya, laughter, I may come down there and taste ya, laughter, what's doing, Joe; Setter, nothing much; Rosenberg, nothing; Setter, uh-huh, uh-huh, I'll call you, inaudible.

Wouldn't you say it's like the end of the conversation?

A Not really, because there are four more pages.

Q Yes, but if the conversation ended here do you say the conversation consisted of the rest of the pages, too, that same day?

Let me ask you a different way.

This exhibit which consisted of about seven pages---

A Yes.

A-428

Q Seven pages, this transcript which consisted of seven pages, I am asking you the conversation to which you were a witness to the Harvey Rosenberg end, that telephone conversation on April 10th, consisted of one page or seven pages?

A This transcript is the conversation of April 10th, the entire seven pages.

Q And it's not true that only page 1 is April 10th, but the other six are from some other time?

A No, sir.

Q Did you see a little antique scale taken from Mr. Setter's possession?

A I wasn't there when he was arrested.

Q Have you seen it in the possession of anybody from your office?

A I really don't recall. There are so many--we have fifteen groups in our office and there is a lot of scales going around. I can't recall.

Q Did you have a conversation with a young lady out in the hall earlier today?

A She identified herself to me as Mr. Setter's fiance.

Q Did you tell her you fellows had a scale?

A I told her, I said if we did have the scale I'm

pretty sure it would be at our laboratory.

Q Did you discuss yourtestimony in this case with Sgt. Rawald before you took the stand?

A No, sir.

Q You never discussed the case with Sgt. Rawald?

A Before I took the stand today?

Q Not this exact moment.

Did you ever discuss the case with Sgt. Rawald?

A Numerous times.

Q And when was the last time?

A This case--probably yesterday.

Q You knew you were being called as a witness at that time, didn't you?

A Yesterday?

Q Yes.

A Yes. As a matter of fact, that was what the discussion was about. I called him up and asked him when I would be called as a witness.

Q And Sgt. Rawald is the coordinator and the case chief in this particular instance, isn't he?

A Yes. He is my supervisor.

MR. KLEIN: No further questions.

MOTIONS TO DISMISS AT CLOSE OF GOVERNMENT'S CASE

Colloquy



THE COURT: Mr. Appleby?

MR. APPLEBY: No further questions, your Honor.

The Government rests.

THE COURT: All right.

You may step down.

(The witness is excused.)

THE COURT: The Government rests.

We will take the jury--the jury will take a short adjournment.

Pleaee do not discuss the case.

The jury may leave.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: Mr. Klein, would you like to make motions now?

MR. KLEIN: Yes, sir.

At this time I respectfully move to dismiss the indictment, particularly counts one and two, on the grounds that there really has been no evidence beyond a reasonable doubt that Mr. Setter made any sale. There was no eyewitness to a sale. We have an absent informant who was the

purchaser. He didn't come to court to testify. The only evidence I think is conjecture. I don't think it's a question of direct or indirect circumstantial evidence. I think it's conjecture in supposition. And we can't let the fact that on July 3rd that there was a quantity of cocaine seized go back and say because of that he must have made a sale.

I say the evidence indicating a sale by Mr. Setter to Harvey Rosenberg on April 17th is wholly lacking and insufficient.

THE COURT: That's on counts one and two?

MR. KLEIN: One and two.

THE COURT: Mr. Appleby, do you wish to address yourself to that?

MR. APPLEBY: Yes.

I know the word overwhelming is used a lot, but I think in this case it's justified. There is overwhelming circumstantial evidence that Mr. Setter sold an eighth of a kilogram of cocaine on April 17th, 1975, to Harvey Rosenberg. We have an actual Kel set recording between Mr. Rosenberg and Mr. Setter. Mr. Setter--excuse me, Mr. Rosenberg was searched before he went

into Mr. Setter's residence. He had nothing but $12 on him. When he came out after making one other visit to the detective's car, he had an eighth of a kilogram of cocaine in his possession.

He went into 54-16 Glenwood Road. That's the residence of Mr. Setter.

Furthermore, there was surveillance on that date and the agents saw Mr. Setter at about 4:10 P.M., just prior to the transaction, enter Mr. Setter's own residence and then shortly after the transaction had been completed, after Rosenberg had left, they saw the residence--they saw Setter depart his residence.

I think the circumstantial evidence is overwhelming, your Honor.

THE COURT: All right.

Motion to dismiss as to counts one and two is denied.

MR. KLEIN: I will reserve my motions on the other three counts, your Honor.

THE COURT: Reserve them until when?

MR. KLEIN: To the end of the case--I will make them now then.

I move to dismiss the remainder of the

indictment.

THE COURT: Motion is denied.

Are you ready? Do you have a witness you want to put on this afternoon?

MR. KLEIN: Yes.

I didn't finish what I was going to say.

At this point I had asked for Agent Ebert because we had discovered after he had testified in the preliminary hearing that his Grand Jury testimony was just the opposite of what he had testified to at the hearing. And those minutes weren't available to me at the preliminary hearing.

THE COURT: In what respect was his Grand Jury testimony opposite to what he had testified to at the hearing?

MR. KLEIN: At the preliminary hearing he had testified that the question--the question pertaining to possession of narcotics or other drugs was first raised in the house.

Now, in his Grand Jury testimony, which Mr. Appleby was under no obligation to give me prior to the trial as far as I understand, that indicates there was a two-fold purpose for going

into the house: One was personal things, and secondly, it was to get the narcotics.

And he said the conversation took place outside. That's the way I read those minutes.

THE COURT: I see.

Are we getting Agent Ebert back here?

SGT. RAWALD: I had attempted to get in touch with him. As I said yesterday, Agent Ebert moved yesterday from New York City to Milwauke.

THE COURT: When is he to report out there?

SGT. RAWALD: Tuesday, your Honor.

I also contacted the Chicago Office because he has friends out there.

THE COURT: You keep on it and we will get him back as soon as we can. We will get him back for you, but in the meantime you take care of whatever you have.

Do you have any witnesses that you want to proceed with this afternoon?

MR. KLEIN: Yes, I do.

May I reserve my renewel of the motion to suppress based on the evidence until after Agent Ebert comes back?

THE COURT: You can make your motion at any time. You can make it now, because the Government has put in their case.

MR. KLEIN: Yes, but it would be stronger if Agent Ebert came back.

THE COURT: If you want to reserve it until after Agent Ebert testifies about it, that's all right.

MR. KLEIN: Sure. That's what I want to do.

THE COURT: What do you want to do at this time? Maybe we will take a short adjournment and let the jury go down for another--tell them to be back by quarter of.

Take a short adjournment.

MR. KLEIN: Thank you.

SGT. RAWALD: Will we need the recording still?

MR. KLEIN: No.

THE DEFENDANT: Yes.

(The defendant and Mr. Klein confer out of the hearing of the court reporter.)

(A recess is taken.)

(The following takes place out of the

EXCERPTS FROM TRIAL TESTIMONY - EDWARD D. RESTIVO



A-436

their money back. And they want their money instantaneously. And they argue with me and I have to go into the dealer and try to smooth it out.

Q And these people---

A That's how I get to know these people.

Q And these people who you know from the street told you what kind of fine car dealer Mr. Setter was?

A I didn't say that.

Q What did they say about Mr. Setter?

A I said I never had any real problems where they come up about Mr. Setter.

Q They never really mentioned Mr. Setter?

A No.

Q So as far as your testimony about his reputation in the community, that's solely based upon the casual acquaintance he has with you as he passes you on the street.

A If you want to put it that way, yes.

Q You were subpoenaed to testify here?

A No, sir.

Q But, I believe you were in the courtroom while the Government's case was going on. Isn't that correct?

A-437

A Yes.

Q Did you hear the tape recording on April 10th that Agent Richel introduced?

A I heard it, yeah.

Q Did you recognize the defendant's voice?

A No, sir, I didn't.

The only voice I recognized on that tape was Rosenberg.

Q You didn't recognize Setter's voice?

A No, sir.

Q I see.

Did you hear any of the other Government's evidence in the case.

A No. I have never been here before.

Q Are you sure it wasn't the defendant's voice on that tape?

A I wouldn't say yes, I wouldn't say no, attorney. It wasn't clear to me. All I heard was the one loud voice.

Q I see.

Well, let's assume it was the defendant's voice. Would it change your opinion about his reputation in the community?

A In the community?

A-438

Q Strike that.

If it was the defendant's voice, would that change your opinion---

A If I was---

Q Let me finish the question.

--concerning his reputation for truthfulness and veracity?

A If I were positive it's his voice it would change my mind. I am not positive it was his voice.

Q If it was him what would be your opinion on his reputation?

A It would change according to my position.

THE COURT: Mr. Klein.

MR. KLEIN: No questions.

THE COURT: Thank you.

You're excused. Thank you.

You may proceed, Mr. Klein.

(The witness steps down and is seated in the audience.)

MR. APPLEBY: Your Honor, may I recall the Officer for one moment, if you don't mind, would you mind?

THE COURT: Yes, you may.

MR. APPLEBY: Would you come back, please,

officer.

E D W A R D G. R E S T I V O, previously sworn, resumes the stand.

MR. APPLEBY: Your Honor, with your permission I would like to play the May 19th, telephone conversation for the officer and ask him whether he recognizes the voice on the telephone conversation.

Would you mind?

THE WITNESS: Can I ask you something?

THE COURT: Yes.

THE WITNESS: Am I going to be brought in as a witness?

THE COURT: Since you're here and since you know him and since you have come voluntarily, he wants to play a tape to see whether or not you recognize the voice.

THE WITNESS: I am not an expert on tapes, your Honor.

THE COURT: I know you're not an expert on tapes, but you do know the defendant.

THE WITNESS: Yes.

THE COURT: And you're here.

THE WITNESS: Yes.

THE COURT: Play the tape.

MR. KLEIN: Your Honor, the tape has already been admitted in evidence so we don't have a question of identification any more.

MR. APPLEBY: Are you conceding it's the defendant's voice?

MR. KLEIN: No, I am not conceding it.

MR. APPLEBY: I have a right to ask the officer about it.

THE COURT: One minute.

After consideration, Mr. Appleby, I don't think I will permit you to do it.

You may step down, Officer, you may step down.

(The witness steps down from the witness stand and has a seat in the audience of the courtroom.)

THE COURT: Mr. Klein.

MR. KLEIN: Yes.

Mrs. Martin.

N A T A L I E M A R T I N, sworn.

DIRECT EXAMINATION

BY MR. KLEIN:

Q Mrs. Martin, are you married?

A-441

We will take a short adjournment.

Please do not discuss the case while you are out.

The jury may leave.

(The jury leaves the courtroom.)

(A recess is taken.)

(The following takes place out of the presence of the jury.)

MR. APPLEBY: May I ask the basis of your Honor's decision about my asking the officer about the tape?

THE COURT: Well, you're seeking to bolster the Government's case with the defense witnesses.

MR. APPLEBY: I think that's perfectly permissible, your Honor.

And furthermore, the officer testified it wasn't the defendant. And in my opinion I don't see how anybody can state it wasn't. He could have said I'm not sure. He said it wasn't, that's for sure.

MR. APPLEBY: I have a right, your Honor, I think, to ask him about the other tape.

THE COURT: Denied, denied.

MR. [illegible]IN: Thank you for the recess, your

EXCERPTS FROM TRIAL TRANSCRIPT - BERNARD MELTZER



Honor.

A-442

THE COURT: That's all right.

MR. KLEIN: Is Mr. Meltzer in?

THE COURT: Ready to proceed?

MR. KLEIN: Yes, sir.

THE COURT: Bring the jury in.

MR. KLEIN: I have resolved the other problem; it's Saturday.

THE COURT: Good, I am glad.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

B E R N A R D  M E L T Z E R , sworn.

DIRECT EXAMINATION

BY MR. KLEIN:

Q Mr. Meltzer, my name is Irwin Klein and I am the attorney for Joseph Setter.

Do you know Joseph Setter?

A Yes, I do.

Q How long do you know him?

A Since September of '74.

Q And what do you do for a living?

A I am a credit manager for Exclusive Motors.

Q And were you a credit manager with

Exclusive Motors for how long?

A Since September of '74.

Q And did Mr. Setter work for Exclusive Motors, too?

A Yes, he did.

Q In what capacity did he work?

A He was the manager.

Q And do you recall the date April 17th, 1975?

A Yes, I do.

Q And do you recall seeing Mr. Setter that day?

A Yes, I do.

Q And where was he that day? Where did you see him?

A He was on the lot and in the office and in the repair shop.

THE COURT: He was on the lot and in the office and in the repair shop? Is that what you said?

A Yes.

Q And for what period of time was he there that you observed him, from when to when?

A I was there from 8:30. He was there from about

quarter to nine in the morning. And Ileft at 6:30 and he was still there that evening.

Q He was still there?

A Yes.

Q And wa. he there about a quarter to five on that day?

A Definitely.

Q And was he there at 5:00 o'clock?

A Yes, he was.

Q And was he there at 5:15?

A Yes, he was.

Q And were you positive of that?

A Positive.

Q Do you have any means of recollecting that particular day? Do you have any record which would refresh your recollection and pinpoint it?

A Yes, I do.

Q Have you got them with you?

A Yes, I do.

Q Would you please take them out, sir.

By the way, Mr. Meltzer, have you ever spoken one or two words to me ever before you got on the stand?

A Never; never saw you before.

A-495

Q Would you want to tell us what these papers are, sir?

A These are papers of work done on that particular day on April 17th. And the record reflects that various cars were worked on on that particular day.

Q And are these records made and kept in the regular course of bueiness in Exclusive Motors?

A Yes. We have records of every day of the year and everything that goes on on the premises within the confines of business, is kept on the premises.

Q And these records are made at or about the time they are referred to?

A Yes, they are

Q And may I see those records, please?

Are they different types of records?

A Yes, they are.

Q And are these all the same type of records?

A These are all the same type.

MR. KLEIN: May I mark this as one exhibit for identification, your Honor?

THE COURT: Yes, you may.

MR.KLEIN: Is that all right with you, Mr. Appleby?

THE COURT: You may mark them as one exhibit, if you wish.

MR. KLEIN: Thank you.

THE CLERK: Six documents, Daily Time and Material Reports, marked Defendant's Exhibit A for identification.

(So marked.)

MR. KLEIN: Thank you.

Q Sir, Mr. Meltzer, I show you Defendant's Exhibit A for identification, a group of white papers entitled Daily Time and Material Reports.

Will you tell us what is that and how does that help you pinpoint April 17th at quarter to five, five, 5:15, that Mr. Setter was at your place.

A At each time we purchased an automobile, the automobile is brought into the repair shop. The automobile is worked on and serviced and to get ready for a customer if we are to deliver a part or if it will be put out on the lot so that it can be presentable for the customers to buy. On that particular day these cars were serviced in addition to one car in particular, a 1968 Mercedes, which took us several days to complete. And the car was worked on that complete day.

A-447

Q Would anything in there indicate that Mr. Setter was at your premises at any particular--on that day or at that particular time?

A Yes. His signatures are on each one of these copies with the date, the stock number of the automobile and the date.

Q Where is Mr. Setter's signature?

A His initials.

Q Where is that?

A His initials are there.

Q Right here where it says "Entered"?

A Yes, J.S. Those are his initials.

Q And are these made out on April 17th?

A Yes, on April 17th where each car is started, where the work is started.

MR. APPLEBY: I'm sorry, I missed the answer.

THE WITNESS: Between--before each car is worked on the Time and Material Sheet is made up.

Q Now, do you have any other type of paper that would indicate that Mr. Setter's presence?

A Yes. I have papers from new car dealers where we purchased the parts and part houses where we pur-

A-44f

chased the work for this particular Mercedes.

Q Were those parts purchased the same day?

A No, these parts were purchased prior to the work being done on the automobile.

Q Do you have any time card or anything indicating that Mr. Setter was there in your premises about that time?

A There was no time card. Just the amount of work that was done on that day by Mr. Setter, he would have had to be there.

Q What kind of work does Mr. Setter do? Mechanical nature?

A Mr. Setter was manager of the used car lot. He overseed all operations. And when the job was too difficult for someone else to handle, he would get in there and do the work. He would perform some of the maintenance on that car, yes.

MR. KLEIN: Are you going to offer those documents?

MR. KLEIN: I guess I will.

MR. APPLEBY: I would like to voir dire if he is going to offer them, your Honor.

MR. KLEIN: All right.

Q What was this car for which all these

A-449

parts were ordered?

A 1968 Mercedes.

Q Did that stand out particularly in your mind for any reason?

A Yes. It was a son of a gun to repair. It was a foreign car and I wasn't too familiar with foreign cars and I remember all the swearing going on to get this car completed on time.

Q Now, all these papers pertaining to parts for that car---

A The three you have in your hand are for parts on that car.

Q The other is a different one?

A That's work allocated for that day.

Q All right.

MR. KLEIN: I offer this for identification as another group.

MR. APPLEBY: May I voir dire, your Honor.

MR. KLEIN: I didn't offer them in evidence, your Honor.

MR. APPLEBY: I'm sorry, I thought youdid.

THE CLERK: Three documents, part receipts, marked Defendant's Exhibit B for identification.

(So marked.)

A-450

Q Did Mr. Setter have anything to do with working on that car, that particular car that day?

A Yes, he did.

Q And what time of the day was that car completed, if it was completed?

A The car was not completed that day. He worked on it the following day.

Q And do you recall now that Mr. Setter was present on the premises of Exclusive Motors, would you say from 4:00 to 6:00?

A Yes, he was. He had to make out the payroll for the following day.

Q How far--do you know where Mr. Setter lives?

A Yes, I do.

Q How much of a distance in time away from Exclusive Motors is his house? I think it's Glenwood Road somewheres.

A Five to ten minutes.

Q By car?

A By car.

Q Is it possible Mr. Setter during the course of the day, particularly between 4:00 and 6:00, could he have disappeared from yourplant---

A No way.

Q --Exclusive Motors, gone back to his house and stayed at his house for a period of fifteen minutes, which would make a total of fifteen, twenty-five, thirty minutes, could he--if he had been away for a half an hour--could he have been away for a half an hour during that period of time?

A It was an impossibility during that period of time.

Q You would have noticed it?

A Yes.

Q You were in constant observation of him during that period of time?

A Yes.

Q What is this other bill here, Boro Auto Body Works?

A This is a car that was allocated to an auto body shop for repair that day. He had to be there to see it. He had to be there when the car came---went out in the morning and he had to be there when the car came back at 6:30 at night. And that's why he stayed late that night.

Q His initials on there, too?

A Yes, it is.

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MR. KLEIN: I ask this be marked for identification, please.

THE CLERK: One bill number 2604 marked as Defendant's Exhibit C for identification.

(So marked.)

Q Now, are you aware of the fact that-- withdrawn.

Were you interviewed by any member of the prosecution staff?

MR. APPLEBY: I will object to a prior consistent statement, your Honor.

THE COURT: Objection overruled.

MR. APPLEBY: I will withdraw the objection. You can ask that question.

A By these particular men present?

Q By anybody from the Government?

A Yes, I was.

Q And were you told that you were being interviewed because your name had been furnished to the Government as a defense alibi witness?

A Yes.

Q And did they ask, whoever investigated, did they ask you questions about there whereabouts of Mr. Setter on April 17th?

A-453

A Yes.

Q And did he ask you the same type, general type questions I had asked you?

A Yes, sir.

Q And did you give him answers?

A Yes.

MR. KLEIN: I will offer these three papers in evidence.

MR. APPLEBY: No objection.

THE COURT: All right.

Mark them in evidence on behalf of the defendant.

THE CLERK: Defendant's Exhibit A, B and Cpreviously marked for identification received in evidence.

(So marked.)

MR. KLEIN: Would the Court bear with me just a moment?

THE COURT: Sure.

Q By the way, do you know if Joseph Setter ever had a yellow Eldorado, yellow Cadillac, owned one?

A Not to my recollection.

THE DEFENDANT: '74 was the year.

(Mr. Klein confers with the defendant out

of the hearing of the court reporter.)

Q From the period of April through--right up to July, July of that year, did you ever see Mr. Setter drive a yellow Cadillac, a yellow Eldorado?

A We have a used car lot. There are so many cars there. It's a possibility he might have been driving a yellow car.

Q You don't know if he owned one or not?

A No, I do not. I never took any interest what kind of car he had.

MR. KLEIN: Thank you very much.

THE COURT: All right.

Give these to Mr. Appleby.

MR. APPLEBY: Thank you.

THE COURT: Cross-examination by Mr. Appleby.

MR. APPLEBY: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. APPLEBY:

Q What was your position at Exclusive Motors again?

A Credit manager.

Q Credit manager.

And how long have you been the credit

manager at Exclusive Motors?

A Since September of '74.

Q When did Joseph Setter start working at Exclusive Motors?

A He was there when I came to work at Exclusive Motors.

Q He was already there?

A Yes.

Q That's the first time you met the defendant?

A Yes.

Q And you know him during the course of your business. Is that correct?

A Yes.

Q And you see him practically every day?

A Now, no.

Q Well, at that time you saw him practically every day?

A Yes.

Q Were you friendly with him during that period of time?

A No.

Q You were not friendly?

A Strictly business association.

Q Strictly business association?

A Yes.

Q Now, you at one point in this case, Mr. Setter told you--had a communication with you concerning this case. Is that correct?

A Wrong.

Q Tell us how you first came to learn about this case?

A He called me up yesterday and told me to come to trial.

Q Yesterday he called you up?

A Yes.

Q That's the first time you learned anything about the case?

A Well, when the detectives were there.

Q Right.

But prior to the time the detectives came to Exclusive Motors to talk to you about the case, had you had any contact with the defendant Setter at all?

A No.

Q Well, you're aware that the Agent had your--had your address and your name. Isn't that correct?

A Of course.

Q Did they tell you how they got your address and your name?

A No. I didn't ask them.

Q So if I understand you, the agents just came one day out of the blue and to your surprise they asked you about Mr. Setter's whereabouts on April 17th?

A Yes.

MR. KLEIN: That's misleading. We told him.

THE COURT: Overruled. I will hear the answer.

A (Continued) That's right. I had no idea they were coming. They came and asked me questions and I answered them.

Q Were you aware that--you are aware Mr. Setter was trying to establish an alibi for April 17th, were you not?

A No.

Q Were you aware that Mr. Setter came down to Exclusive Motors to try to find some records in order to establish an alibi?

A I didn't search for the records until the detectives came.

Q And that was the first time you found that you would be an alibi witness?

A That's when I assumed I would be an alibi witness.

A-448a

Q Did you have any knowledge that the defendant had made contact with Exclusive Motors in trying to establish an alibi for himself?

A No.

Q Now, is Exclusive Motors a large lot, small lot? What kind of business? Describe the physical layout of Exclusive Motors.

A It's 100 x 100.

Q Yards?

A 100 x 100 yards. The lot is 60 x 100 and the office is 20 x 100--and the office and the repair shop and clean up.

Q I didn't hear the last thing, I'm sorry.

A The office, the repair shop and the clean up.

Q When you're standing in any part of the premises can you see all of the rest of the premises?

A From the office I can see the entire premises.

Q There isn't anyplace that you can't see?

A I can see the entire premises.

Q Now, in the function of Exclusive Motors--incidently, how many employees are there at Exclusive Motors?

A We have five.

Q Five employees.

And what was Mr. Setter's position at that time?

A He was the manager.

Q And what were his duties as manager?

A He was to oversee all operations and maintain they were--make up records and make up payroll.

Q Did there come a time--did any part of his duties entail leaving the premises of Exclusive Motors?

A Very rarely.

Q Tell us about the times that it would.

A The only times it would would be for lunch or---

Q Is there a cafeteria on the premises of Exclusive Motors?

A No, there isn't.

Q When somebody goes to lunch they leave the premises?

A Yes.

Q And how long is lunch hour?

A We don't take lunch hours. We run out, grab a sandwich and bring it back in.

Q And have you ever seen the defendant Setter leave for lunch?

A No.

4450 a

Q He never leaves for lunch?

A No. I used to go to the store and get him his lunch.

Q He works nonstop?

A He doesn't work nonstop. He sits in the office and takes a break in the office.

Q How long a period of time were you in association with Mr. Setter when he was in Exclusive Motors? How long a period of time did that encompass?

A September of '74 until he left.

Q When was that?

A Approximately June or July of '75.

Q During all that time did Mr. Setter ever leave for lunch?

A I'm sure he did, but I couldn't recollect exactly. Everyone goes to lunch once in a while. You have to go get things out of the tailor's or whatever.'

Q So there were times Mr. Setter would leave on occasion for lunch?

A On occasion, but not that particular day.

Q Well, approximately how many times would he leave for lunch during that period, what pereentage of the time?

A Once a week, if he took lunch.

Q Once a week he would leave for lunch?

A If he took lunch. He wasn't much of a lunch eater. But every once in a while he would.

Q Were there other occasions Mr. Setter would leave the premises of Exclusive Motors? You mentioned clothing or something like that.

A Sure, we had to go to the cleaners to get out clothes out, yes.

Q Were you permitted to go--is this a strict organization that no one is allowed to leave the premises except for lunch or a pretty loose atmosphere?

A It is not that it's strict. Time doesn't warrant it. Usually we send someone to do our errands for us.

Q Did there come a time you ever left to do errands?

A Yes.

Q Who is your boss?

A At that time?

Q Yes.

A Mr. Setter.

Q Mr. Setter was your boss? In other words, Mr. Setter was in charge of the operation there

A-45a

basically?

A Yes.

Q And he didn't have to go to anybody to get permission to leave?

A Yes, he did.

Q Who would he have to go to?

A To me.

Q I thought Mr. Setter is the boss there?

A Yes, but in order to leave the premises he has to take a car.

Q A what?

A A car. And I maintain the keys for the automobile

Q How many automobiles are there at Exclusive Motors?

A It holds approximately thirty-three automobiles.

Q And you hold the keys to all them?

A Yes.

Q Where do you hold the keys? On your person?

A In the office.

Q In the office?

A Yes.

Q Are you in the office at all times during the day?

A Most of the time.

Q There are times when you are not?

A Yes, there are.

Q Are there times Mr. Setter has access to those keys?

A Yes.

Q Are there times he has gone in, gotten keys, taken a car and left?

A No.

Q He has never done that?

A He would ask me for the keys, being my supervisor.

Q I don't understand. Who is the boss of who there?

A He is the boss, but as far as--he was working in the shop and if he wanted to take a car and go somewhere, he would say, "Get me the key for this particular."

Q He would make you get it?

A Yes.

Q And there would be no impediment if he wanted to go into the desk and get a pair of keys and drive it off?

A No.

Q It wouldn't be against the regulations?

A-454a

A No.

Q You wouldn't be mad at him for doing that?

A No.

Q You would have no authority to be mad at him?

A No.

Q Because he is your boss?

A Yes.

Q Now, this is a used car dealership. Isn't that correct?

A Yes.

Q And part of the business of used car dealership is to road test cars, isn't it?

A When they come in.

Q When they come in?

A Yes.

Q Was it part of the duties of Mr. Setzer to road test cars?

A Yes.

Q He would road test on occasion?

A Yes.

Q Did it often?

A No.

Q On these occasions that he road tested

A-455a

cars he would always ask you for the keys?

A Yes.

Q On every occasion?

A Yes.

Q He would go up to you and say, "Please, can I borrow the keys?"

A Yes, because the keys were situated behind my desk. In order to get the keys you have to walk around me and it's easier to ask me for it.

Q What percentage of the day would you be sitting behind the desk?

A Large percentage.

Q What percentage?

A Six and a half to seven hours, eight hours.

Q Those hours you would be behind the desk?

A Well, sitting and talking to a customer.

Q And while you were talking to a customer, Mr. Setter could go and get the keys and road test a car or get the keys or go to lunch,he wouldn't have to ask you about it?

A No.

Q And, of course, at Exclusive Motors there is no coffee breaks or anything?

A We bring coffee in.

Q Who gets the coffee?

A Either I do or one of the clean up fellows.

Q Who?

A I do or the clean up man.

Q The clean up man.

Mr. Setter ever get coffee?

A No. It's usually sent out for.

Q He never got coffee in the whole time you have known Mr. Setter?

A He usually sent out for it. He drank coffee.

Q But he never went out for coffee?

A Yes.

Q On occasion he would do it?

A Yes.

Q And he would take one of the cars from the dealership?

A Not to go to get coffee. The coffee shop is on the corner.

Q How long would it take to go get coffee?

A Two minutes.

Q And when he went to go on these errands how long would he take for an errand?

A He would just go next door, get the coffee and come right back.

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Q I am talking about an occasion, not often, but rarely he would go on errands. How long would that take?

A It depends on the type of errand. If he has to road test a car, it's a matter of riding around the block; two or three minutes.

Q What is the longest period of time Mr. Setter ever left Exclusive Motors for an errand or to road test a car or to go out on other business?

A That I couldn't recollect.

Q Could it be up to an hour on some occasion?

A Never.

Q Isn't it part--Mr. Setter was the boss there, isn't that right?

A Yes.

Q Would the duties of a boss be to go and talk to other businessmen not located at Exclusive Motors?

A It wasn't one of his functions. There were other parties involved in the ownership of the corporation. They are the ones who spoke to the automobiles--anything else having to do with the business. Mr. Setter's duties as a manager was to oversee the premises.

Q I see.

Mr. Setter, you state, was at Exclusive

Motors from 8:45 to 6:30 P.M.?

A Excuse me?

Q On April 17th. We are on April 17th now.

A 8:45.

Q 8:45 to 6:30 P.M.?

A Yes.

Q 8:45 to 6:30 P.M. he was there?

A Yes.

Q And he came into the premises at 8:45?

A Yes, because I opened up at 8:30.

Q You remember that distinctly?

A Every day like clockwork.

Q You came in at 8:30 that day?

A Yes, because the customer was bringing the car in that morning, left the car outside the premises and I had to be there to bring the car in.

Q You distinctly remember being there at 8:30 A.M.?

A Give or take five minutes.

Q Taking five minutes or so, no question being there at 8:30?

A I am religious that way. I ordinarily have breakfast before I open the place.

Q You are talking about ordinarily or

religiously or that day?

A Every day, 8:30.

Q There was never a day you wouldn't be there at 8:30?

A No.

Q You would get there 8:30 and Mr. Setter comes in fifteen minutes later, right?

A Right.

Q Okay.

How did he arrive? In a car?

A Yes.

Q What kind of car?

A Whatever car he took the night before.

Q Do you recall what kind of car that was?

A No.

Q So he comes in 8:45 and what is the first thing that Mr. Setter does?

A He sits down at his desk and allocates the workload.

Q Sorry, repeat that.

A Sits down at his desk.

Q He would sit down at his desk?

A Yes.

Q Do you have any recollection of him sitting

down at his desk that particular day?

A Not that particular day.

Q So you are talking about what ordinarily happens?

A Yes.

Q So that particular day he would sit down at his desk at 8:45. And what occurred after he sat down at his desk? We are talking about now what your recollection of what happened on that day, what happened at 8:45.

A At 8:45 I brought the car into the shop and he started allocating the work for the day.

Q I am talking about Mr. Setter. He is at his desk?

A He is allocating work for the day.

Q You remember him allocating the work for the day on that particular day?

A Yes.

Q What kind of work was he working on?

A We were particularly involved in the Mercedes.

Q The Mercedes?

A Yes.

Q How do you know it's the Mercedes he was working on?

A-461

A On the basis of the time and material reports that were done on that day.

Q What?

A On the basis of the time and material reports that were done on that day.

Q How long was he at his desk?

A I couldn't say exactly how long he was at his desk, but the mechanic comes in at 9:00 o'clock. The apprentice mechanic comes in at 9:00 o'clock. The clean up men come in at 9:00 o'clock. And that's what he has to tell them what to do so you're talking about fifteen minutes.

Q What happens at 9:00 o'clock with respect to Mr. Setter? What does he do?

A He allocates work for the apprentice mechanic and allocates work to the clean up men and then he would repair the work by himself.

Q And do you remember him doing this distinctly on that day?

A On that day because of the Mercedes.

Q Are you saying this from a logical point of view or you specifically remember him doing this?

A I specifically remember him working on the Mercedes.

Q We are at his desk right now, right?

A-462

A Yes.

Q And he is working on paperwork?

A Right.

Q And you specifically remember this, right?

A He does it every morning.

Q I am talking if you have a present--as you are sitting here now in this courtroom, do you remember him specifically sitting there working on that particular paperwork that morning?

A Yes.

Q How long does he work on the paperwork?

A Until the mechanic comes in.

Q That's 9:00 o'clock?

A 9:00 o'clock.

Q What happens at 9:00 A.M.?

A He gets up and allocates the work to the mechanic and clean up men.

Q How long does it take?

A Ten minutes.

Q You remember him allocating the work to the different people that day?

A Yes. I was right there.

Q So this is 9:10, right?

A Yes.

Q What happens then?

A Then the work is proceeded and then that's when he started to work on the Mercedes.

Q What did he do specifically? Tell us exactly where he went and what he did.

A The Mercedes--I put the Mercedes in the--for the repair shop. The car was lifted up. We started working on it and started pulling out the dashboard and the work proceeded from there.

Q Mr. Setter was working on these repairs?

A Yes. He is the only one who had knowledge how to properly repair that automobile.

Q How many days did you work on that Mercedes?

A Two days.

Q Two days?

A Two, two and a half.

Q Two and a half days?

A Yes.

Q Now, what you're describing to us now about the work on the Mercedes, could it have happened the next day what you're describing now?

A No.

Q You say it went over to the next day as well?

D-464

A Right.

Q It couldn't have been that day either?

A Not to be completed on that day.

Q And he was working on the Mercedes with you in collaboration?

A I wasn't working.

Q He was working on it by himself?

A He was working on it and we have an apprentice mechanic who did some of the work on the car.

And this particular type of repair, the apprentice didn't do, but assisted him on some of the operation.

Q How long did this repair work take?

A Practically nonstop. We had a deadline to meet. We had an irate customer who wanted his car or would want his money back.

Q How long did the repairs take?

A Until I left that day.

Q Excuse me?

A The car was worked on until I left that day.

Q By Mr. Setter?

A Yes.

Q Nonstop?

A Up until around 5, quarter to five, he had to

A-465
stop and figure the payroll for the next day, and then he went back to work on the Mercedes.

Q Let me see if I understand you correctly.

From 9:10 A.M. until about quarter to five Mr. Setter was at that Mercedes Benz nonstop working on the automobile?

A As a matter of fact, I brought him in his lunch and I was eating lunch over his shoulder.

Q And so he was there continuously without any gaps whatsoever?

A Right.

Q He didn't leave anytime during that period?

A Not that day.

Q You had him under observation from 9:00 A.M, 9:10 A.M. until quarter to five?

A No. I had work to do, too.

Q Obviously. So you didn't have him under observation during that whole period?

A No. But I would be standing in the office. Every fifteen, twenty minutes I could see right into the shop and he was there.

Q So every fifteen or twenty minutes---

A Everytime he left he would say he was leaving

in case somebody called.

Q How many times did he leave?

A Not that often.

Q Not that often?

A Not that often.

Q How often?

A Whenever he had to go for coffee next door and come back.

Q You remember him going for coffee?

A That particular day?

Q Yes.

A I went for it.

Q I thought you said he went for coffee?

A On occasion he would go out for coffee.

Q He didn't go on that day?

A I went for coffee on that day.

Q You remember that specifically?

A Yes.

Q How do you remember specifically going for coffee that day?

A I usually go for coffee every day. We don't like to take the men off their work.

Q You're telling us based on what happens

ordinarily and I am asking you specifically.

You understand the distinction?

A That day there was so much work to be done no one moved. We stood at the jobs and no one moved.

Q Where did you go for coffee?

A On the corner, the restaurant. It's two stores away.

Q So this is April 17th. How about April 24th? Did you go for coffee on that day?

A I have no idea.

Q You have no idea?

A No. I would have to check my Time and Material Reports for April 24th.

Q And that would tell you if you went for coffee?

A Based on the workload, if he was too busy to go for coffee, then I would go for coffee.

Q If I understand you correctly, you look at these workload records?

A Right.

Q And you say to yourself, there was a lot of work that day for Joe Setter, so therefore I must have been the one who went for coffee? Is that what you basically said?

A Not that particular day. That particular car was a son of a gun and he didn't move from that car.

Q Let's say what happened April 24th.

A I couldn't say what happened April 24th.

Q You couldn't tell if you looked at the records?

A I would have no reason to look at the records for April 24th.

Q Let's say you looked at the records for April 24th. Would you be able to say you went for coffee that day?

A I could assume because I usually went for coffee.

Q You couldn't say definitely?

A Not definitely.

Q Were there any other days that stand out in your mind so well so you can remember specifically that you went for coffee?

A Not without checking my Time and Material Report.

Q If you checked your Time and Material Report you could say who went for coffee?

A Yes, if a particular car stands out in my mind and I would be able to tell whether or not it's

the type of a day where no one would leave the premises.

Q Let's go to April 24th, all right?

MR. KLEIN: This is not proper cross-examination, your Honor. We are talking about April 17th.

THE COURT: I will permit him. The witness is here and I will permit him.

MR. KLEIN: On April 24th the time is after the place closed.

THE COURT: I will permit him.

Q Sir, April 24th, 1975, I would like to direct your attention to that date.

There was testimony in this case that at 2:40 P.M. an undercover detective, James Copeland, sitting in this courtroom right now, met the defendant Joseph Setter at the Grotta-D'oro Restaurant, 691 Flatbush Avenue in Brooklyn--incidentally, is 691 Flatbush Avenue near you?

A No.

Q How far away is it?

A What is the cross street on 691? I know Flatbush Avenue and I would say the cross street is near Church Avenue and it's approximately fifteen minutes away.

A-470

Q Fifteen minutes?

A Ten to fifteen minutes.

Q Do you know if the defendant frequents the Grotta-D'oro Restaurant?

A I have no idea. I never socialize with him.

Q Tell us about April 24th. When did the defendant arrive on that day, what time?

A I open up at 8:30. He is usually there a few minutes after I open up.

Q What did he do on that day?

A He would sit down at his desk. He would allocate,--make up the work records for that day and then allocate them.

Q Then what occurred?

A I have no idea without checking my records.

Q If I told you that he was at the Grotta-D'oro Restaurant on Flatbush Avenue with another individual, two other individuals, would you be able to check your records and tell us whether that coincides with your records or not?

A At what time?

Q 2:40 P.M.

A Possibly.

MR. KLEIN: Your Honor, I would ask that

the defendant--that the witness produce those records so he can testify to that.

THE COURT: You will produce the records tomorrow for that date.

THE WITNESS: Yes.

Q Incidentally, there was testimony that the defendant when he met the detective at the Grotta-D'oro Restaurant was driving a yellow Eldorado Cadillac.

Now, do you have such a Cadillac? At that time did you have a yellow Eldorado Cadillac for sale or used by the business?

A I would have to check my records.

Q Can you check your records also on that point?

A Can I write this down?

THE COURT: Surely. Write it down.

THE WITNESS: Do you know what year?

THE COURT: What year is that Cadillac?

MR. APPLEBY: 1974.

THE WITNESS: Yellow?

Q Yellow.

A On April 24th?

MR. KLEIN: May I respectfully remind the Court this witness is not offered as an

A-472

alibi witness for April 24th.

THE COURT: We are aware of that. But, however, April 24th happens to be part of what is before this Court. And this witness seems to know what went on for each of those days. So he can check his records and we will see just what happened, whatever he says.

Q You know the defendant's handwriting?

A Yes.

Q Do you recognize it when you see it?

A Yes, I do.

Q And he very often has to write numbers also when he makes out all kinds of documents. Is that correct?

A Yes.

Q I'm going to show you Government's 2 in evidence and ask you, first of all, whether you recognize those telephone numbers.

A That is the phone number--these two phone numbers are the phone numbers for Exclusive Motors.

Q Exclusive Motors?

A Yes.

Q The first one you don't recognize?

A No.

A-473

Q Now, take a look at those numbers.

(Handed to the witness.)

Q Does that look like Joseph Setter's handwriting?

A I really couldn't say.

Q No idea?

A No idea. You asked me if I knew his signature.

Q Now, sir, there also has been testimony that Mr. Setter met with Det. Copeland again on May 21st of 1975 at the Grotta-D'oro Restaurant.

Do you recall when the defendant entered his place of--when he came to work on that day?

A Well, I open up at 8:30 every day.

Q Do you remember anything about what the defendant did on that day?

A Yes. Up to 9:00 o'clock I can say because he did the same thing every day.

Q That's based upon ordinary usage, ordinary activity?

A In order to function in business it has to be done every day in order to allocate the work and work had to be done every day in order to allocate the work before the men came in.

Q Do you remember anything else he did on that

day, May 21st?

A Not without checking my records.

Q Would you check your records for that day?

THE COURT: Not only are you to check your records, please bring them in and bring the Time and Record sheets for those dates. That is what you are to bring to court.

THE WITNESS: Yes.

Q Incidentally, there are no time sheets. Is that correct?

A Dated.

Q You don't have time sheets at Exclusive Motors?

A No, just dated.

Q Now, when you testified with respect to April 17th and you were very specific about it, can you tell us any other day back in April of 1975?

A Not without checking my records.

Q Well, when the officers came to interview you---

A Right.

Q --did you recall what happened on April 17th without checking the records?

A No. I pulled out the records.

Q And that was the only reason that you know that the defendant was there exclusively during that period of time. Isn't that correct?

A Yes.

Q That's a fair statement?

A Yes. The records reflected---

Q In other words, if I understand your testimony correctly, the basis of your statement is that the defendant was there continuously uninterruptedly from 9:00 until after 6:00 is based upon your analysis of those papers. Is that correct?

A Wrong.

Q Tell us what is correct.

A It's based on the fact that I recollected the '68 Mercedes, the work done on that automobile and the amount of work involved and the headaches that were involved and the amount of time it took to do that job.

Q And isn't it a fact---

A The records only brought to my attention that particular day and the particular vehicles worked on that day.

Q Would this be a fair statement, sir: You looked at your records and you saw there was a

heavy workload on that Mercedes Benz, you know Mr. Setter worked on that Mercedes Benz sometime during that day and based upon the fact that it was a heavy job, you concluded he was there continuously and uninterruptedly during that period of time?

A Yes.

MR. APPLEBY: I have no further questions.

THE COURT: All right, Mr. Klein, you may proceed again.

REDIRECT EXAMINATION

BY MR. KLEIN:

Q Did you associate the unique work on that foreign car with Mr. Setter's presence at your place of business that day?

A Yes.

MR. APPLEBY: Objection to the word "associate," your Honor. I think it's ambiguous.

THE COURT: Overruled.

I will permit it.

Q How many Mercedes Benz did you ever work on during that period Mr. Setter was there?

A One.

Q Is this it?

A That's it.

A-477

Q And it sticks out in your mind?

A Yes.

Q And you had a tough job with it because it was unfamiliar?

A Right.

Q Mr. Setter was the only one familiar with it?

A Yes.

Q And now when you looked at these time sheets, the Time Record Sheets, does it conjure up in your mind an independent visual recollection of what went on during that day in connection with the fixing of that Mercedes Benz?

A Yes.

Q And in those images do you see Joseph Setter there during that day?

A Yes.

Q During the hours of 4:00 to 6:00?

A Yes.

Q For how long a period at all on that day was he ever out of your sight, the most?

A Two minutes, three minutes.

Q You were asked about other dates, April 24th and May 21st. Let us assume when you bring in these

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Time Records there is nothing significant on it such as this one which had the one Mercedes Benz you ever had in the place. Would you be able to describe with reasonable certainty whether or not Mr. Setter was there at all hours of that day?

A Possibly not.

Q This one you know because this is the only time you ever had that type of vehicle?

A Right.

Q And what you're saying--what your testifying to now is your own independent recollection as refreshed by that time and record sheet, is that correct?

A Exactly.

Q You told us the size of the establishment you say was 100 x 100 what, feet?

A 100 yards by 100 yards.

Q 100 yards by 100 yards?

A Yes.

Q Did Mr. Setter get down in the pit with the other mechanics working on the car?

A It's up off grounds. We don't have a pit.

Q A hydraulic lift?

A No, we have jacks.

Q You were using jacks?

A Yes.

Q Did Mr. Setter work on that car?

A Yes.

Q Did he get dirty?

A Yes.

Q Did he get grease on him?

A Of course.

Q You didn't get dirty that day, did you?

A I never get dirty.

Q And you are the one who went for coffee and you were dressed for it. Is that right?

A Yes.

Q Who did the car buying?

A We had the--one of the principals of the corporation did all the car buying.

Q One of the owners went out and bought cars?

A Yes.

Q It wasn't Mr. Setter's duty?

A No.

Q Mr. Setter was also an employee there, was he not?

A Yes, he was.

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Q I show you Defendant's Exhibit A, Daily Time and Material Reports. And tell me, how much time was spent on that car that day? Can you tell us from that?

A Sure.

Q And tell me what tells you that amount, that time?

A This sheet tells me the work was started on April 17th. And based on the amount of work that was done on the car, it could not have possibly been completed until two or three days later.

MR. KLEIN: I have no further questions, your Honor.

THE COURT: Mr. Appleby.

MR. APPLEBY: No further questions, your Honor.

THE COURT: Let me ask you, in connection with this car are these the only records that are kept?

THE WITNESS: No, we have records--we have a police book that is maintained.

THE COURT: You have a police book showing this car?

THE WITNESS: Yes.

THE COURT: What does the police book show?

THE WITNESS: It shows the date the car was purchased and the date the car was sold.

THE COURT: I see.

And what other records as to this car? Do you get a Bill of Sale when you purchase it?

THE WITNESS: Yes.

THE COURT: Do you get a Bill of Sale when you sell it?

THE WITNESS: Yes.

THE COURT: Are those records available?

THE WITNESS: From 1974, I would have to ask the owner.

THE COURT: I don't know. I am asking you. You are the one who keeps the records.

THE WITNESS: The police book--the information--

THE COURT: What you do, you go to the owner and you get all of those records.I want the lice book here.

THE WITNESS: All right.

THE COURT: That's tomorrow.

Ladies and gentlemen, we will adjourn for the day and we will resume tomorrow at 1:30

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3 Colloquy

AFTERNOON SESSION

(The following takes place out of the presence of the jury:)

(The defendant is not yet present in the courtroom.)

MR. APPLEBY: Your Honor, this is Mr. Meltzer.

THE COURT: Do you have the records, Mr. Meltzer?

MR. MELTZER: I have all the records and a photocopy of the police book because my employer said there was Federal and State laws that prohibits the police book from leaving the premises and he can't operate the business without it.

THE COURT: What you are to do, you are to show all this to Mr. Appleby right now.

MR. APPLEBY: May I ask Mr. Meltzer if it's a copy of the police book or the entire police book?

MR. MELTZER: It's just a page for the Mercedes.

You ask me about a '74 yellow Cadillac and I looked through the police book and since

the conception of the business there has never been that car.

MR. APPLEBY: What is the license plate?

SERGEANT RAWALD: 42852.

MR. MELTZER: It's not an Exclusive Motor Dealer plate.

SERGEANT RAWALD: According to the Motor Vehicle Bureau it is.

MR. APPLEBY: You state that under oath, sir.

THE COURT: Now do you have the Bill of Sale?

MR. MELTZER: Yes.

THE COURT: Both of them?

MR. MELTZER: The Bill of Sale to the customer and the one for the purchase of the car, I don't have it, but I have a photocopy and original odometer statement stating who he purchased it from, the mileage at the time of purchase and a copy of the page that indicates who it was purchased from.

MR. APPLEBY: May I state something?

I would ask Mr. Meltzer to bring in all the records to reflect which plates he had at his place of business in April of 1975.

As a matter of fact, I would like the entire year because we would like to check it out because there was testimony as to the plate number, your Honor.

THE COURT: You will have to get this in.

Mr. Klein, come up.

I am having these records turned over to Mr. Appleby and there is a problem that came up as to the plate number of the yellow Cadillac that was mentioned, and it's a dealer's plate. And evidently the DEA says their check shows it belongs to Exclusive and he says it doesn't.

MR. MELTZER: I am only familiar with transporter plates.

THE COURT: What is transport plates?

MR. MELTZER: It says transporter on it and it's used to transport a car from one place to another.

THE COURT: What did that license say?

POLICE OFFICER RYAN: I checked with the New York City Police Department this morning on the telephone and spoke to one of the operators at the New York City Police Headquarters and I asked that individual for dealer

registration 42852.

THE COURT: What year?

POLICE OFFICER RYAN: There are no years.

MR. MELTZER: It's possible the plates exist.

MR. APPLEBY: I thought you said you only have transporter plates.

MR. MELTZER: We have dealer plates, but I don't use them.

MR. APPLEBY: You also have them in your place of business?

MR. MELTZER: Yes.

MR. APPLEBY: I thought you said you only had --

MR. MELTZER: I said I only use transporter plates.

MR. APPLEBY: You have dealer plates as well?

THE COURT: You give us all the license numbers.

MR. MELTZER: I can't guarantee that particular plate.

THE COURT: You don't have to guarantee us anything. You have to give us all the plate

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numbers.

MR. MELTZER: Up until what time? From the starting of the business, for that year or --

THE COURT: For the year 1975, I believe.

MR. APPLEBY: And in particular the license plate just enunciated by Officer Ryan.

MR. KLEIN: Can I have permission to look at those records, too, your Honor?

THE COURT: Look at everything.

Aren't you still on the case?

MR. KLEIN: I didn't know if it had to do with me.

THE COURT: It's part of your defense and it comes out of your defense.

Don't you appreciate this?

MR. KLEIN: Sure do.

THE COURT: Mr. Appleby, do you want to serve a subpoena for anything you may need as to this?

MR. APPLEBY: I think your direction is really much greater than a subpoena.

THE COURT: You think it's all right?

MR. APPLEBY: Yes. I think your direction

is good.

THE COURT: Either way.

MR. APPLEBY: Just to cover it, I think I should issue a subpoena as well and I want to make it clear I want the police records --

THE COURT: You want to subpoena that police book?

MR. MELTZER: Your Honor, is that admitted as evidence and we will not get it back?

THE COURT: No, it may be evidence, but you get it back as soon as the case is over. You get it back. The case will just go for a couple of days.

MR. MELTZER: We can't buy or sell without it. Business just doesn't do buainess without it.

THE COURT: We want to see it, that's all.

MR. APPLEBY: Also, I would like any records with respect to a late model Pontiac that may have existed in April 1975 at Exclusive Motors.

MR. MELTZER: Late model Pontiac? 1975?

MR. APPLEBY: Yes.

MR. MELTZER: 1971?

THE COURT: If you want to issue a subpena, do so. Because Mr. Setter will not be here for a short while and we have time to do that.

MR. MELTZER: I told my employer it's a Federal Court judge, but he said he wants to see something in writing.

He didn't clarify it. He said a late model Pontiac.

THE COURT: Do you wish to specify any more for him on the Pontiac?

MR. MELTZER: Color, year.

(A recess is taken.)

(The defendant is present and the following occurred out of the presence of the jury:)

THE COURT: Ready to proceed?

MR. KLEIN: Yes, your Honor.

THE COURT: All right.

We can bring in the jury.

Mr. Meltzer, you can return.

B E R N A R D M E L T Z E R, previously sworn, resumes the stand.

(The jury enters the courtroom.)

THE COURT: Ladies and gentlemen, Mr. Setter had some trouble with his car so there was a problem on his getting here. So this was what occasioned the fact that you didn't get into court as I would have liked you to today, but we will proceed.

Mr. Meltzer, you are still under oath.

You may proceed, Mr. Appleby.

MR. APPLEBY: Thank you, your Honor.

THE COURT: Now, you have the records Mr. Meltzer has brought?

MR. APPLEBY: I will get to the records, your Honor.

THE COURT: Proceed as you wish.

RECROSS-EXAMINATION

BY MR. APPLEBY:

Q Now, Mr. Meltzer, I believe your testimony was yesterday that the first time you learned anything about the Center case, or even the possibility that you may be a witness is when several police officers came to your place of business. Is that correct?

Q And there is no doubt in your mind about that?

A To the best of my recollection, yes.

Q Is there any doubt in your mind that's the first time you learned about the case?

A No.

Q Oka--.

MR. APPLEBY: Your Honor, at this point I would ask that your HOnor instruct the jury with respect to Rule 12.1, which requires the defense counsel to give notice to the defendant of that alibi defense and that they must provide the names of witnesses and addresses.

MR. KLEIN: I would join in. I was going to ask the same question of your Honor, too.

THE COURT: That was complied with, wasn't it?

MR. KLEIN: Yes, it was complied with. But we would like your HOnor to instruct the jury what the procedure is when the defense intends to use the defense of alibi.

THE COURT: Well, if the defense intends to use the procedure -- the defense of alibi,

such as was the case in this proceeding, it's necessary that notice of this intention be given to the Government prior to the trial.

And this was complied with by the defense in connection with this case.

MR. APPLEBY: And one of the requirements, your Honor, is they give the names of the witnesses the defense intends to rely on.

THE COURT: Yes, that's true. They are to give the names of the witnesses and who it is the defense intends to rely on as to the issue of alibi in the defense .

MR. KLEIN: And we did that, sir.

THE COURT: Yes, you did that; definitely.

Q Now, Mr. Meltzer, you just heard the statement of the law by the Court. Isn't that correct?

A Yes.

Q And do you still say that the first time you ever heard about this case is when the police officers came to Exclusive Motors?

A Yes.

Q You had no contact with Mr. Klein's office, Mr. Klein or anybody associated with Mr. Klein?

A No, sir.

Q You had no contact with Mr. Setter?

A He comes on to the lot and says hello. That's the only contact.

Q Did Mr. Setter discuss the fact that he was under indictment?

A No; never mentioned it.

Q Never mentioned it to you?

A NO, never did.

Q The first time you learned Mr. Setter was under indictment is when the two police officers came to your place of business and asked you some questions?

A Yes.

Q About Mr. Setter's whereabouts on April 17th?

A Yes.

Q And none of Mr. Setter's friends or relatives came up to you?

A No, sir.

Q No doubt in your mine about that, is there?

A No doubt.

Q Incidentally, when these police officers came to Exclusive Motors, when they came to you,

did they inform you of their identity?

A Yes.

Q Did they tell you why they were there?

A They didn't tell me what the case was about. They told me they were investigating it.

Q What did you understand the purpose of their meeting with you was?

A They came down to ask questions.

Q Weren't you interested in what the questions were about?

A Yes, I was. I believe they asked me what took place on a particular day.

Q And were you interested as to what?

A Yes, I was.

I turned around and looked at the files and pulled out the records to show them and they weren't that interested in it. They said it's okay then and --

Q If I understand you correctly, Mr. Meltzer, when the police officers came to your place of business and started inquiring about April 17th, it was then you went into your file and looked into your file and looked into the documents. Is that

correct?

A Yes.

Q Is there any doubt in your mind about that?

A No.

Q Is it possible you might have had those records ready for the police officers when they came?

A NO.

Q No doubt about that?

A No doubt. I have it in the folder. Everything is dated in the folder. It's a matter of putting my hand in and pulling out that particular month.

Q You pulled out the file?

A Yes.

Q That's the first time you looked at those records for sometime; isn't that correct?

A Yes.

Q There was no need to look at it. Isn't that right?

A True.

Q Incidentally, when did you learn that you would be a witness in this case?

A A day before yesterday.

Q The day before yesterday?

A Yes.

Q Before that you had no idea you would be testifying as an alibi witness?

A No idea whatsoever.

Q How did you learn you would be testifying?

A Mr. Setter called me up and told me to come to court.

Q Mr. Setter called you u p and told you tocome to court.

What did he say on the telephone?

A I had to go to court tomorrow.

Q Did he tell you why you had to appear?

A I had to appear and possibly bring in some evidence.

Q Did he tell you what evidence he wanted?

A He didn't tell me what the evidence was and I had a general idea based on what the detectives told me.

Q He didn't tell you what documents to take?

A NO.

Q Was there any further conversation between you and Mr. Setter?

A No.

Q That was it, just a call by Mr. Setter telling you to please bring in documents, you have to be in court and that's it?

A Right, for that particular day.

Q For the particular day you were to testify to?

A No, for the particular day, April 17th.

Q And there was no other conversation?

A No.

Q And you knew Mr. Setter during your course of employment with him over a period of time; isn't that correct?

A About September of '74 to June of '75, talking about eight or nine months.

Q Before that telephone call you received from Mr. Setter telling you you had to come down to court, what contact did you have with Mr. Setter prior to that time?

A Hello, goodbye, how are things?

Q How did that contact me --

A Stopped down the lot to say hello.

Q When is the last meeting prior to that telephone conversation Mr. Setter had with you?

When did that take place?

A I don't recall.

Q Just approximately.

A I don't recall.

Q Is it a matter of months, a matter of days?

A No, it's a matter of weeks. He stopped by about once every other week.

Q Once every other week?

A Yes; hi, how is business, things like that.

Q Would you tell the jury approximately how often Mr. Setter would come by?

A Every other week.

Q Approximately how long a period of time?

A A few minutes.

Q During that time, what was your discussion with Mr. Setter?

A How is it going, how is this, how is that?

Q No discussion about his indictment whatsoever?

A NO. I didn't know anything about it.

Q The first time Mr. Setter discussed the fact that he was under indictment is when you received a telephone call from him a couple of days just

before you came to testify?

A No. Because the detectives --

Q No. In terms of testifying in this case you didn't know you were going to testify in this case?

A No, I didn't know it, I didn't know it.

THE COURT: Do we have a date as to when he saw the detectives?

MR. APPLEBY: Yes, there is, your Honor.

Q Mr. Meltzer, does February 20, 1976, refresh your recollection as to when you met the detectives?

A Not that particular day. I don't remember that day.

Q Approximately in that area?

A No. I don't remember what month.

Q Well, it's four or five months ago, something like that?

A Yes.

Q Now, Judge Bramwell asked you to bring down various records yesterday. Do you recall that?

A Yes.

Q And as a result, you produced some

records. Is that correct?

A Yes.

MR. APPLEBY: I would ask that this set of records be marked as one Government exhibit for identification.

THE CLERK: Five documents. Time and Material Reports, marked Government's Exhibit No. 25 for identification.

(So marked.)

MR. APPLEBY: I would ask this next set of documents be marked as a Government exhibit.

THE CLERK: Five documents. Time and Matetial Reports, marked Government's Exhibit No. 26 for identification.

(So marked.)

Q Incidentally, Mr. Meltzer, your relationship with Mr. Setter is certainly a cordial one, there has never been any animosity, hasthere been?

A We have had our differences.

Q Any kind of animosity between you now?

A Not really. What happened was in the past.

Q Well, when would you say you cleared up these differences that you had?

A When he left.

Q When was that?

A In about June, the end of June.

Q '75?

A '75.

Q And in approximately February of 1976 there was no animosity between you, was there?

A Yes, there certainly was.

Q What was the animosity?

A He cut my salary.

Q He cut your salary?

A Yes.

Q I see.

And when Mr. Setter -- let's take these times when Mr. Setter came by these -- came by your place of business after February of 1976.

There would be times he would come by to say hello. Isn't that correct?

Sure.

Q And were there any harsh words between you when he came by on these occasions?

A No.

Q Basically hello and that type of thing?

A Yes, because I forgot what he had done to me.

Q I'm sorry, I didn't hear your answer.

A I let bygones be bygones.

Q I see.

It's a friendly conversation, basically?

A It's always a friendly conversation. I am not a vindictive person.

Q I see.

And you testified there was no conversation about this criminal case. Is that correct? Th- first time you learned about it is when he telephoned you, is tha t correct, a couple of days before you testified?

A The first time I learned about it was with the detectives.

Q The first time you learned about the case?

A Yes.

Q The first time you had a conversation with Mr. Setter about it is when he called you about it on the telephone ?

A Wrong.

Q Tell me about the conversation you had with Mr. Setter.

A After the detectives came down, I called him up and asked him what was happening. And he

didn't volunteer any information to me.

Q He didn't tell you any information whatsoever?

A No.

Q Did he tell you why he wouldn't give you any information?

A No. I really didn't push it that far because I felt it wasn't that much of my business. I thought I owed my employer a -- my employer a phone call to find out why, because the police officers came on the premises.

Q So you didn't tell us about the phone call to Mr. Setter before when I asked you about it, did you?

A YOu didn't ask me.

Q Fine.

I will let the record stand.

Now, I show youGovernmmant 25 for identification and I will ask you whether you recognize those documents.

(handed to the witness)

A Yes, I do.

Q What do you recognize them to be?

A Excuse me?

Q What do you recognize them to be?

A Time and material reports made out for April 24th, work done on that particular day, authorized and approved by Joe Setter.

Q Now, you have had a chance to look over those records prior to coming to court. Isn't that correct?

A Briefly.

Q Well, they are only a few documents.

A I looked for the date, pulled them out of the file and stuck them in the envelope. I really didn't scrutinize them.

Q Would you look at them now.

You have looked them over?

A Yes.

Q Now, does that refresh your recollection as to Mr. Setter was doing on April 24th?

A Yes. The work load -- the one particular car that stands out in my mind, the 1972 Eldorado. I am not sure, but I think we delivered it to an Italian man.

Q Who delivered it to the Italian man?

A The dealership.

Q Who drove it to him?

Q Who picked it up --

A They pick them up. We don't bring the cars to the customer. They get it at our place and pick it up at the premises.

Q And Mr. Setter worked onthat car. Is that correct?

A Yes, he did.

Q What work did he do on the car?

A He repaired two axles and put in shocks.

Q I am not asking you to read from the document, sir. I am asking now, looking at the document now in this courtroom, do you remember specifically Mr. Setter working on that car?

A Yes.

Q You do?

A Yes.

Q Tell us how he worked on that car.

A He worked on the car with the aid of an assistant, an apprentice mechanic we had.

Q That's the same mechanic you mentioned before in connection with the Mercedes Benz?

A Yes, I believe so.

Q You believe so? You're positive?

A Yes.

Q No question in your mind?

A No.

Q When you said you believe so, you were incorrect?

A We had a lot of mechanics.

Q Now you're absolutely certain it's the same man?

A Yes.

Q Incidentally, what is his name?

A Scotty.

Q Scotty what?

A I don't remember his last name.

Q This is what kind of car again?

A '72 Eldorado.

Q What kind of work did Mr. Setter do on the '74 Cadillac?

A Repair axles and that takes two people. It's too heavy for one person to do.

Q What was Mr. Setter's part in the labor on the car?

A To remove the axles.

Q You saw him remove the axles?

A Yes.

Q You were watching him do that?

A Yes.

Q Where were you watching him do this from, what vantage point?

A The office. There is a fine line between the office and the manager shop and the door is all the way open between them.

Q And you saw them do the entire operation?

A Not the entire operation.

Q Tell us what they put in the car.

A The shocks.

Q Did you see him do the shocks?

A No.

Q How long did it take?

A About an hour, hour and a half.

Q So during the time he was putting in the shocks you didn't observe him working on the shocks?

A No.

Q And that took an hour and a half?

A Right.

Q Now, let's take another one of those cars. Take any one of them.

Incidentally, what time did he work on the Eldorado?

A It's a half a day job. Whether it was done

in the morning or afternoon, I couldn't tell you.

Q You have no recollection?

A No.

Q What is a half a day job? How many hours is that? Did Mr. Setter work on that?

A Possibly maybe longer, if there was difficulty.

Q Did he work on the Eldorado non-stop?

A Yes.

Q No question in your mind?

A Non-stop, I don't know. I didn't see him put the shocks in. I don't know whether it was him or the mechanic.

Q Is it possible in your mind, Mr. Setter may have left Exclusive Motors at that time?

A I don't recall on that day. It's not like the Mercedes. Whether he went out from work on that day, I don't know, or whether he went out from work --the Mercedes is a heck of a job.

Q This is the most difficult job you have had in your business?

A Yes, it was.

Q Any other difficult jobs?

A We have difficult jobs, but not like this.

Q And this is the most outstanding one you

have experieneed in your history as a dealership man?

A Yes.

Q I see.

So tell us what percentage of time on April 24th that you personally observed Mr. Setter during that day?

A I cant tell you whether it was morning or afternoon and I can't tell you if it was one hour or two hours, but I saw him putting in the axles.

Q I'm sorry, I missed your answer.

A I saw him putting in the axles. Whether it took an hour, two hours, three hours, I couldn't tell you on that day because it didn't take a full day.

Q What percentage of the time did you not have Mr. Setter under your observation during that day? You can estimate for us.

A Maybe an hour or so.

q Could it have been longer than an hour?

A No.

Q I thought the shocks took an hour and a half?

A Yes.

Q So it could have been an hour and a half that he left Exclusive Motors; isn't that right?

A No.

Q Tell us why.

A I would notice he was gone for that period of time.

Q I thought you didn't know whether he put the shocks on.

A To leave the premises he would have to come to m e and get the keys to leave.

Q And incidentally, on April 24th did you leave your office at any time?

A I don't remember.

Q You don't remember? It's possible you could have left your office?

A Yes.

Q And it's possible Mr. Setter could have come into the office and taken the keys and left?

A It's possible.

Q And it's possible he could have left for an hour and a half. Isn't that true?

A Sometime during the day, yes.

To pinpoint it, no. On the basis of work load there is a possibility there may be an hour

of free time, but you can't call it free time to wander off because there is other work to be done.

Q Is it possible he could have left for an hour and a half?

A No.

Q Not possible?

A He may have had an hour and a half of free time and not to leave the premises.

Q How many hours was Mr. SEtter not under your personal observation?

A I told you before, I couldn't pinpoint it. It could have been a couple of hours in the afternoon or a couple of hours in the morning. I don't know when the job was done, morning or night.

Q So it's possible Mr. Setter could have left during the day for a couple of hours? You could have not known that?

A Possible.

Q You leave the office sometimes and you don't know whether he picks up the keys?

A I don't leave for that period of time.

Q He could have come into the office when you just left for five minutes? When you were gone for five minutes he could have picked up keys

and left for two hours, the two hours that you didn't have him under observation. Is that correct?

A Possible.

Q I show you Government 26 and ask you whether you recognize it.

(Handed to the witness)

A Yes, the same as the other date, May 21st, and they also reflect the work load for the day.

Q Now, let's take the first car there.

And you have had a chance to look through those documents; isn't that correct?

A Yes.

Q What time did Joe Setter come in that day?

A He comes in every day about quarter to nine, ten to nine, twenty to nine, ten to nine.

Q That's every day?

A Every day after I open up.

Q What happened after he would enter Exclusive Motors that day?

A He would make out the work load for that day, the mechanics would get an idea what they have to do, and the cleanup men would get an idea what they have to do.

Q Will you tell us what you specifically remember Joseph Setter doing on that day from your own recollection?

A May 21st?

Q Whichever one.

A You handed me May 21st.

Q Yes, that's correct.

I am not asking you to look through those documents. All I want you to do is look at all those documents and tell us what Joseph Setter did on that day.

A On this particular day I know that from one o'clock on, this 1971 Oldsmobile was sold to a customer and the customer brought the car back under a complaint and I advised her under the warranty she would have to pay half and the corporation would have to pay half.

And she tried to stab me with a screwdriver and Joe Setter took the screwdriver away from me and we had a hassle all day. She wouldn't leave the premises.

Q This is the entire day?

A The entire afternoon.

Q Approximately what time to what time?

A About one-thirty on. I was pretty shooken up. I couldn't work the rest of the day.

Q Why one-thirty on?

A Until closing. I left about six-thirty, the closing.

THE COURT: Mr. Meltzer, let me ask you, is each of those slips for a different car?

THE WITNESS: Yes.

THE COURT Each is for a different automobile worked on that day?

THE WITNESS: Yes.

Q Now, this incident occurred at one o'clock; is that correct?

A Closer to two. She came in about twelve-thirty, one o'clock, and we hassled for a while.

Q How do you recall so specifically she came a t twelve-thirty, one o'clock?

A Because it was after lunch.

Q How do you know it was after lunch?

A Because I usually bring something in, twelve, one, two.

Q What did you eat that day?

A I have no idea.

Q But you specifically remember eating lunch

that day?

A Yeah, because I was very upset.

Q When you ate lunch, this was before the incident; is that correct?

A Yes.

Q What did you have for lunch that day?

A I don't remember because -- because I regurgitated that day. I was almost killed.

Q Didn't this incident with the lady occur after lunch.

A Yes.

Q You specifically remember eating lunch that day. Is that correct?

A Yes.

Q Tell us about your lunch.

THE COURT: If you can't say, tell us.

THE WITNESS: I do what I do every day. I had a sandwich.

Q But you specifically remember eating lunch that day?

A Yes, because I threw it up.

Q You remember throwing up, but do you remember eating lunch -- strike that.

You ate your lunch and a woman came in with a car?

A Yes, a woman and her boyfriend came in with a car.

Q A woman and- a boyfriend came in with the car?

A Yes.

Q What- happened then with respect to this incident?

A They wanted some repairs done and I said I would be glad to repair the car, but they would have to pay half.

Q Excuse me?

A They would have to pay half.

Q They would have to pay half?

A Yes.

Q Go ahead.

A We got into an argument and she didn't want to pay anything.

Q What kind of repairs was it?

A According to this, it was an air conditioning valve.

But specifically, the car had a problem starting. It seemed to me she was always having her car towed and that particular day, I guess it finally got to her and she tried to kill me.

Q Let me see if I understand you correctly. What kind of a car was it?

A An Oldsmobile.

Q What?

A 442. It's a faster version of a Cutlass.

Q And this lady came in with her boyfriend?

A Yes.

Q And a t approximately what time?

A About twelve-thirty, one o'clock.

Q I see.

And how old was this lady?

A Twenty-eight, thirty.

Q Describe her.

A Dark complexion, Negro, about five feet eight, Afro hair which she sometimes changed to a regular hairdo. She wore very tight fitting clothes.

Q And she came with her boyfriend?

A And she worked for a lawyer and she borrowed some tapes from someone -- I think the mechanic or cleanup man -- she never returned it.

Q And this is the lady that came in with the car?

A Yes.

Q And she had a boyfriend with her?

A Yes.

Q And there was no problem with her car?

A Right.

Q What was the problem again?

A It was always being towed. It had problems starting and overheating.

Q This is what she told you?

A Yes. And some other defects.

Q And she came up to you; is that correct?

A Yes, she came to me because I --

Q What did she say to you about her problem with her car?

A She said she is sick and tired of the car, she wants us to take it back.

I said, sorry, we can't take it back. We sold you the car.

Q This is a car she bought from you?

A Yes.

Q I see.

A And that we couldn't take the car back and she got very irate.

Q She got very irate?

And then what happened?

A Then she took a screwdriver off the desk and

A-518



tried to kill me.

Q Where was the boyfriend at this time?

A Sitting on the chair melancholy.

Q She came at you and tried to stab you; is that correct?

A Yes, in the throat.

Q Of course, youreported this to the police?

A No.

Q You didn't report this to the police?

A No.

Q After she tried to stab you with the knife -- excuse me, the screwdriver, what happened?

A Joe took the screwdriver away from her.

Q Joe took the screwdriver away from her?

A Yes.

Q Did Joe call up the police?

A No.

Q I see.

Then what occurred?

A Then we sat her down and talked and we forgot about the fifty-fifty deal, you know. And we just wanted to get rid of her and so we were repairing the car.

Q So you made friends after the stabbing,

the attempted stabbing incident?

A Sure.

Q Bygones were bygones?

A If I made her pay she might come back.

Q And nobody at Exclusive Motors reported the incident?

A No. We can't report every fight we have.

Q What is the name of this lady, excuse me?

A I don't recall her name.

Q Do you have the card there?

A Yes. Her name is not on the card.

Q Can I see that, please?

A Yes.

Q This is a 1971 Oldsmobile 442, right?

A Yes.

Q If you check your records, could you find out who this car was registered to?

A Of course.

Q All right.

Would you check that, please.

THE WITNESS: Excuse me, your Honor, can I have a scratch pad?

THE COURT: Yes. Give him a sheet of paper.

THE WITNESS: Do you have the paper there, the Time and Material Report?

On the top of that you will find a three numbered code for a stock code.

Q Here, you take a look at it and take the information you need.

(handed to the witness)

Q Okay.

No question in your mind this took place from approximately 1 p.m. all the way through to 6 pm; is that correct?

A She was there most of the day while we were repairing the car. She wouldn't leave.

Q It started at 1.p.m.; is that correct?

A Approximately.

Q And it lasted for at least how long?

A 'Til about five-thirty, six.

Q No question in your mind that's how long it took?

A No question. I didn't want to talk to her! She kept wanting to talk to me and talk to me. I just walked away from her.

Q This is a four and a half hour period? It started out as an ordeal and ended up as an

amicable arrangement?

A Yes.

Q More or less?

A Yes.

Q And if we found out the names of these people, they would be able to verify the story you're giving us?

A Yes, sure, yes.

MR. APPLEBY: One moment, if your Honor please.

THE COURT: Sure.

Q And there is no doubt in your mind from one o'clock to two-ten p.m. you were engaged in this incident with this woman and this man?

A From what?

Q From one o'clock to two-ten p.m., April 21st --

MR. KLEIN: May, May.

Q May 21, 1975?

A Im not sure it's two-ten p.m. It could have happened two-thirty p.m. I said after lunch.

Q Oh, this incident could have happened after two-thirty?

A Yeah.

Q I see.

It might have happened after three o'clock?

A No, no later than that. We started working on her car somewhere between two and two-thirty.

Q How far is Flatbush Avenue and Winthrop Street from Exclusive Motors?

A About fifteen minutes one way.

Q So this incident very well could have happened after two-ten p.m.?

A No. We repaired her car after two o'clock. We started working on her car about two, two-thirty. When she tried to kill me it was right after lunch. I had lunch about twelve, twelve-thirty.

Q When did the assault incident take place?

A One, one-thirty.

Q One, one-thirty?

A Somewhere after lunch, somewhere between one-thirty -- twelve-thirty and one-thirty, quarter to two. I can't pinpoint the time.

Q Sometimes do you eat your lunch after two-thirty?

A Never.

Q Never in your life?

A No. As a matter of fact, I watch the clock. When it hits twelve o'clock, I am out.

Q You're religious about that?

A Yes. And there is a reason for that.

Because everybody goes to lunch at twelve and there is no reason for me to go out when somebody comes back. It's overlapping.

Q I thought you have a sandwich in your desk?

A We bring it in.

Q You can have the sandwich at any time?

A Yes.

Q Your lunch is a ten-minute proposition?

A Yes. My mechanics and cleanup men get a half hour.

Q I understand that.

But you basically take your lunch in ten minutes?

A I take my lunch, eat it, it takes me five minutes to get it.

Q Do you watch your clock to see when your lunch hour is coming up?

A Believe it or not, I do.

Q Believe it or not.

So these are ten-minute lunches?

A I don't gobble it down; ten minutes, twenty minutes.

Q There is no question you have this ten-minute quick sandwich lunches between twelve and one o'clock?

A Once in a while I cheat, I might take half an hour, forty-five minutes.

Q You might take a half a sandwich during the morning?

A No.

Q Never in the morning?

A No.

Q Sometimes possibly in the afternoon you may have that sandwich, late in the afternoon?

A Three meals a day I eat out. My refrigerator isn't turned on. I am divorced.

Q I'm talking about the times you eat.

A I come in about a quarter to eight and go to the restaurant and at eight-thirty I open up. And twelve o'clock I eat. And after work I go to a restaurant and eat. I eat in the restaurants all the time.

Q Not at work?

A At night I eat in restaurants all the time.

Q But at work you eat at work?

A My lunch meal is at work. My breakfast meal, of course, is before I go into work and my dinner meal is when I get out of work.

Q Your lunch meal is at a specific time, your lunch meal?

A Yes.

Q And that's how you remember this incident with this lady occurred 1 p.m. approximately?

A It could have been a quarter to one and it could have been a quarter after one and I know I ate lunch about twelve o'clock and within an hour it was up.

Q You ate lunch at twelve o'clock?

A As a matter of fact --

Q Can I just ask you a question --

MR. KLEIN: Why not permit him to answer?

THE COURT: Permit him to answer.

A As a matter of fact, it could have been closer to twelve-thirty because if I recall, I was in the process of eating my sandwich when she came into my office.

Q The sandwich came into your office?

MR. KLEIN: The woman came into the office.

THE COURT: You're beginnig- to repeat yourself.

MR. APPLEBY: I didn't hear the answer, your Honor.

THE COURT: He says he goes out and brings his sandwich back and has his sandwich in the office. It could have been closer to twelve-thirty, h e said.

MR. APPLEBY: All right.

Just one last question.

Q Back in 1975, April, who were the employees of Exclusive Motors?

A Me, Joe Setter, Scotty -- I don't know his last name. There was a cleanup man by the name of Pettway, P-e-t-t-w-a-y, was his last name. I don't recall his first name. Mr. Rappaport was the principal and there was Mr. Krous, who was the principal.

Q I am talking about the people on the premis s. How many people were on the premises during 1975 as employees?

A There was myself, Joe Setter, the mechanic,

the cleanup man and a salesman.

Q Who was the mechanic, the cleanup man and salesman?

A The mechanic -- Joe was considered the mechanic. The apprentice mechanic was a kid named Scotty, I don't know his last name. I never took an interest in it. And the last name of the cleanup man was Pettway. I don't remember his first name.

And the salesman's name was Herman.

Q Herman?

A Herman.

Q You don't remember his last name?

A Salzman.

Q Herman Salzman?

A Yes.

Q He lives in Brooklyn?

A No, I don't believe so.

Q During the period of time you knew MR. Setter, you have had a number of conversations. Isn't that correct?

A Sure.

Q And you know his voice very well, dnnt you?

A Yes, I do.

Q And you would be able to recognize his

voice if you heard it?

A Yes.

Q Even over a recording device. Isn't that correct?

A Over a telephone.

Q Over a telephone?

A Yes.

MR. APPLEBY: Your HOnor, with your permission, I would like to play one of the telephone calls.

THE COURT: Mr. Klein, I am asking you. If you object, I won't permit it.

MR. KLEIN: Well, I think this request should have been made at the sidebar. If I refuse now, it has a detrimental reflection.

THE COURT: As far as the Court is concerned, going into these areas at this time is not proper.

MR. APPLEBY: I am willing to make Mr. Meltzer my own witness for this purpose.

THE COURT: I know what you'r e doing, but it's not proper.

MR. APPLEBY: I am willing to make Mr. Meltzer my own witness for this purpose.

THE COURT: I know what you're doing, but it's not proper doing it in this fashion. And if Mr. Klein objects I will not permit it.

And I don't think it's proper. I was about to tell you I wasn't going to let you do it.

MR. KLEIN: At this time I would like to ask for the withdrawal of a juror and the declaration of a mistrial because yesterday at the sidebar Mr. Appleby made the same application.

THE COURT: It's a similar application.

MR. APPLEBY: It wasn't at sidebar, Mr. Klein.

THE COURT: It was done before the jury on the last application, too.

MR. KLEIN: It was?

MR. APPLEBY: Yes.

THE COURT: Yes. The policeman was sitting right here.

MR. APPLEBY: May I have a sidebar just for a moment, your Honor?

THE COURT: Denied.

Anything further?

MR. APPLEBY: No further questions, your Honor.

THE COURT: Mr. Klein, you may proceed.

FURTHER REDIRECT EXAMINATION

BY MR. KLEIN:

Q The first words you and I spoke to each other were where?

A Right here.

Q Did I ever talk to you outside the courtroom?

A No.

Q Ever talk to you on a telephone before?

A No.

Q Or anybody from my office talk to you?

A No.

Q In person or by telephone or letter or anything?

A No.

Q And when the detectives came to you Palmieri is the name of the man?

A I don't remember the name.

Q When the detective came to see you in February after we had notified the Government you were going to be one of the alibi witnesses, did

he ask you specifically about April 17th?

A Yes, he did.

Q And then later on when you spoke to Joseph Setter on the phone and told him you had a visit by the detective, did he -- did you tell him he questioned you about Joe Setter's whereabouts on April 17th?

A Would you repeat that?

Q Did you tell him what the detective talked about?

A Yes, I told him they were down there to investigate him.

THE COURT: Mr. Klein, I'm sorry to interrupt you. As a point of information, is it a fact that he was put in as an alibi witness and didn't know about it? Is that a factor?

MR. KLEIN: I don't know. As far as I am concerned, I have no knowledge.

THE COURT: That's what it seems to be. These people come in and he didn't know up to then and you must have given the Government the name prior to that time?

MR. KLEIN: Yes. MR. Setter said, "I was working in the place on the 17th, you can

prove it by asking my boss."

THE COURT: But you gave his name prior?

MR. KLEIN: Yes.

THE COURT: And he didn't know you had given his name?

MR. KLEIN: I never spoke to him before.

THE COURT: But from the facts here, this man didn't know you had given his name?

MR. KLEIN: Probably not.

THE COURT: Yes. That what it seems to be.

Q Did you tell Mr. Setter what the detectives had spoken about?

A Yes. I told him they asked questions about the 17th of April.

Q What did Mr. Setter say to you?

A He said, "Don't worry about it. They are just investigating something."

Q He never told you he is under indictment or anything?

A No.

Q NOw, you're talking about April 24th and you're talking about this car with the axle. Mr. Setter was working on the axle, the half day job or something?

A Yeah.

Q About --

A Two axles.

Q You didn't see him put the shocks on?

A No.

Q Is that the only car Mr. Setter worked on on that day?

A No, of course not.

Q So when you didn't see him working on the shocks of the car it's possible he was working on another car?

A According to the records he did work on the other cars.

Q He did work on other cars then?

A Yes, he did.

Q Tell us, for instance, what other car he was working on?

A A 1971 Ford van he worked on. There was a 1971 MUstang he worked on. There was a'71 Mercury that he didn't work on, the mechanic worked on it by himself.

There was a '69 Cadillac sedan he didn't work on; the mechanic worked on it by himself. And then there was this '72 Eldorado that he and the

mechanic worked on.

There were three cars that day they worked on.

Q Is it possible on that particular day he could have been out of your sight and off the premises for a period of time without you knowing about it?

A It's a possibility.

Q And that is different from the other day, April 17th where the Mercedes Benz sticks out in your mind?

A No doubt; no way he left the premises on that day.

Q Did you bring some other records here?

A Yes, I did.

MR. APPLEBY: Mr. Klein, there is an envelope there.

Q Do all these papers pertain to the Mercedes?

A Yes, they do.

MR. KLEIN: May I offer this for identification?

THE COURT: Sure.

Mark it.

THE CLERK: The whole thing?

MR. KLEIN: Yes, the whole envelope.

THE COURT: One envelope and contents marked Defendant's Exhibit D.

THE CLERK: Is this one of your office records?

THE WITNESS: Yes.

MR KLEIN: PUt it on the back of the envelope.

THE CLERK: No, I will use a tag. I don't want to mess the envelope up. He can always take the tag off.

(So marked.)

Q I show you Defendant's Exhibit D for identification and ask you first, is this envelope a regular record kept in the regular course of business of Exclusive Motors?

A Yes. This is a normal stock envelope that records the time the car is purchased, the inspection date and the time the car is sold and the person the car is sold to.

In this envelope we keep the bill of sales, warranties, mileage statement and anything pertaining to the automobile.

Q Does that indicate -- this refers to the Mercedes?

A Yes.

Q Does that indicate the date the Mercedes was purchased by Exclusive Motors?

A Yes.

Q What date did you acquire it?

A 11/15/74.

Q Does it also indicate on there the date that the Mercedes was sold?

A Yes.

Q And what date was it sold?

A February 5, '75.

Q Now, you testified yesterday that on April 17, 1975, that car was in the shop and work was being done on it that took two and a half days?

A Yes.

Q Who owned the car at the time? Did you own the car at the time?

A Mr. Steve Schlisser owned the car, S-c-h-l-i-s-s-e-r.

Q Was he theman you had sold the car to in February of '75?

A Yes.

Q How long is your warranty good for?

A This particular car, the warranty was good

for thirty days.

Q Now, when the repairs came in, it was beyond the warranty period, wasn't it?

A Yes.

Q And were you making those repairs under the warranty or a separate charge?

A No charge.

Q You were doing it beyond the warranty period?

A Yes.

Q Any particular reason for it?

A We wanted to be a good Joe; that's it. We were doing the warranty for th e man because he had a lot of problems with the car ever since he bought it and it just had to be done. The car wouldn't function properly without this kind of work.

Q Did he as' for his money back?

A Certainly did. I guess that's the reason we did the work, becauee he insisted if the car could't be repaired properly he was going to go to Consumer Affairs and do a job on us.

Q So you did the work for him?

A Yes.

Q And that's the particular reason the

repairs on that car stand out in your mind?

THE COURT: What kind of a car was it?

THE WITNESS: A 1968 MErcedes Benz.

THE COURT: I see.

What price was it selling for?

THE WITNESS: It sold for $3400 plus tax.

THE COURT: I see.

Q In this envelope -- yesterday Judge Bramwell asked you to bring certain documents pertaining to this car. What was this yellow paper in the envelope?

A This is a bill of sale.

Q A copy, you mean?

A A copy of the bill of sale. He has the original.

Q This is the bill of sale from Exclusive Motors to Mr. Schlisser?

A Yes.

Q He has the original?

A Yes.

Q NOw, what is this paper, this orange one?

A This is the 30-day guarantee; 30-day or one thousand miles, fifty-fifty.

Q NOw, what is this document?

A This is the mileage statement from the automobile dealer we purchased the car from.

Q And what is the date of that?

A November 15, '74.

Q And what is the other one I am handing you?

A This is the mileage statement of the car that was sold to Mr. Steve Schlisser on February 5th.

Q What was the mileage on that car when you received it?

A The mileage on the car when we received it was 54,338.7.

THE COURT: 54,000?

THE WITNESS: Yes.

THE COURT: Is that actual mileage?

THE WITNESS: Yes.

THE COURT: That was actual mileage?

THE WITNESS: Yes.

THE COURT: That car hadn't been used much, had it?

THE WITNESS: Not at all. That is why he paid so much for it.

THE COURT: He paid so much for it?

THE WITNESS: A '68 Mercedes, $3400.

THE COURT: I see.

Q You said 54,000 when he bought it?

A Yes.

MR. KLEIN: You say that's much mileage, your HOnor?

THE COURT: Not on a '68 car, definitely not. That's not mileage on a car, period. That's what he told you. That's why he got that kind of a price for it.

Q Did Judge Bramwell also ask you if you had a purchase record or sales record of this car?

A Yes.

Q Do you have duplicates there?

A Yes, I have duplicates.

THE COURT: I think he told us everything. He told us when it was bought and whenit was sold.

Q What is this piece of paper?

A This is a purchase record. It indicates whom we purchased the car from, serial number and mileage.

Q Other cars on that sheet?

A Yes.

Q This is taken from a book?

A Yes.

Q HOw about the page underneath it?

A It's a sales record. This indicates to whom and when we sold the car.

Q Together with other cars?

A Yes.

Q These are normal business records, right?

A Yes.

THE COURT: It wasn't that you were just making the first delivery, this was actual repairs?

THE WITNESS: Yes, that's right. I stated that yesterday.

THE COURT: You stated delivery.

THE WITNESS: No. This is 8:30 in the morning.

Q Would you please put those in the brown envelope they came in sowe can keep them together.

Mr. Meltzer, that incident with the lady, was the gentleman her common-law husband who was with her, if you know?

A They lived together. I don't know if they were legally married.

THE COURT: What does this have to do with anything?

MR. KLEIN: This is on the May 21st, I believe.

THE COURT: I said what does this have to do with anything, the relationship of the people? What does this have to do with anything?

MR. KLEIN: She came with someone.

THE COURT: She came in and the man sat there; nothing wrong with that.

Q Now, did you repair the lady's car?

A Yes.

Q And do you recall this lady going to the Consumer Affairs Bureau and suing you?

A I believe she did.

Q And were you required then to repair her car for free? Was it settled? Was the matter disposed of?

A It escapes me. I don't remember.

Q You remember this is the lady?

A Yes, I remember almost getting killed.

MR. KLEIN: No further questions, your Honor.

MR. APPLEBY: Just a few questions.

THE COURT: Yes, make it short. No sense

going all over it.

MR. APPLEBY: Yes, your Honor.

FURTHER RECROSS-EXAMINATION

BY MR. APPLEBY:

Q Mr. Meltzer, there has been testimony that a New York dealer's registration number 42852 was seen being driven by Mr. Setter and being driven to his residence. Would you check your records to see whether you had those dealers' plates in April 1975.

The other question I want to ask you is --

THE COURT: Do you have any idea whether that would be one of the plates for Exclusive Motors?

THE WITNESS: That is a possibility. There are three, four, five sets of plates. I don't recall the numbers of them.

THE COURT: Okay.

Q One other thing, any of the same employees now employed at Exclusive Motors that were employed there on April 17, 1975?

A Me.

Q You're the only one?

A Yes.

Q It's been a complete turnover?

A Yes.

Q Can you tell us the full name of any employee other than yourself and Joseph Setter who was employed there on April 17, 1975?

A Whoever Scotty is.

Q Whoever Scotty is?

THE COURT: He doesn't know any full name.

Q The last question:

Do I understand you correctly, in the Mercedes Benz you did the work on the car two and a half days --excuse me, for two and a half days and sometime subsequent to the time that the warranty ran out?

A Could you repeat that, please?

Q The warranty on the Mercedes ran out at a certain time. Isn't that right?

A Yes.

Q And after that period of time you did two and a half days work on it; is that right?

A Yes.

Q Whereas, you were under no obligation to do so?

A Yes.

Q You felt it was your moral obligation?

A Right.

The car was a headache to me. I think he put a lot of money into the car himself.

Q You did it basically because you wanted to be a nice guy?

A We do it occasionally.

MR. APPLEBY: No further questions.

THE COURT: Mr. Klein.

MR. KLEIN: Two questions.

FURTHER REDIRECT EXAMINATION

BY MR. KLEIN:

Q The parts had to be ordered for the Mercedes Benz?

A Yes, they did.

Q HOw long did it take for the parts to come in?

A It took anywheres from a week to two weeks.

Q And was Mr. Setter on vacation at any time when the parts came in? Do you know?

A Mr. Setter was on vacation the beginning of April.

Q What I am suggesting is, Mr. Schlisser, whatever the -- whoever got the Mercedes, Mr. Schlisser, if he brought the car in for repair earlier the parts were ordered?

EXCERPTS FROM TRIAL TESTIMONY - DEBRA PERNICE



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D E B R A P E R N I C E, sworn.

DIRECT EXAMINATION

BY MR. KLEIN:

Q What is your name?

A Debra Pernice.

Q Do you know Joseph Setter?

A Yes, I do.

Q Debra, what is your birthdate?

A 4 -- April 28th.

Q April 28th?

A Yes.

Q Are you engaged to be married to Mr. Setter?

A Yes, I am.

Q On April 28, 1975, did you see Mr. Setter?

A Yes, I did.

Q And how long a period of time, continuous period of time, had you been in Mr. Setter's company up to and beyond, from when before and to when afterwards?

A From around nine o'clock to one in the morning.

Q Nine o'clock of what day?

A April 28th.

Q Were you with him on the 27th?

A During the day.

Q Debra, please pardon me for being presumptuous. I have to represent Mr. Setter.

Do you live with Mr. Setter?

A Yes, I do.

Q And did you live with him on the evening of April 27, 1975?

A Yes, yes.

Q And what time did he come home that night?

A Excuse me?

Q What time did he come home that night?

A It was right after work.

THE COURT: You have to keep your voice up.

A After work.

Q About what time?

A Six.

Q And did you stay in the house on the 27th?

A Yes.

Q And did you get up in the morning on the 28th?

A Yes.

Q And did he stay in the house all day during the day or did he go somewheres? Was there

any part of the day he wasn't with you on the 28th?

A No.

Q Do you recall what day of the week it was, if you recall?

A I think maybe it might have been Tuesday or a Monday?

Q Now, did you do anything in particular to celebrate your birthday with Mr. Setter?

A Yes.

Q And who did it? In whose company? Just the two of you?

A The two of us went to dinner.

Q What time did you go to dinner?

A Around nine o'clock.

Q Where did you go to dinner?

A Cooky's Restaurant on Flatbush Avenue and Avenue U.

Q How long, from when to when did you have dinner at Cooky's?

A From nine to about eleven.

Q At night.

A Yes.

Q And is there a moving picture theatre in that vicinity or next to Cooky's?

A Yes,there is.

Q There is?

A Yes.

Q Do you recall the name of the picture that was playing that night?

A Yes, Earthquake.

Q Why do you smile and shake your head?

A Because the restaurant was trembling from the movie.

MR. APPLEBY: I'm sorry, I didnt' hear that answer.

THE COURT: The restaurant was trembling from the movie.

MR. KLEIN: Would you take judicial notice, your Honor, about the fact that there was special sound effects at that picture?

THE COURT: NO, I will not take judicial notice of anything with respect to that. How can I say that?

MR. KLEIN: I thought it was fairly common knowledge with respect to the movie.

THE COURT: You mean when there is a movie and there is an earthquake picture and the premises next door shake?

MR KLEIN: They advertise a particular sound vibration.

THE COURT: I don't know anything about it.

MR. KLEIN: I didn't see the picture, either, your Honor.

THE DEFENDANT: Mr. Klein.

THE COURT: Where did you get your information from?

MR. KLEIN: The newspaper or advertisements. I didn't see the picture.

THE COURT: I didn't hear anything about it. You're telling me and she can tell us and we will accept it.

MR. KLEIN: Excuse me a minute, your Honor.

(Mr. Klein and the defendant confer with each other out of the hearing of the court reporter.)

Q This was at Kings Plaza Shopping Mall?

A Yes.

Q And where is the moving picture theatre in connection with the restaurant?

A I believe it's directly above.

Q The moving picture theatre is directly

above?

A Around that area, yes.

Q And the restaurant is in the lower level?

A Yes.

Q And then what time did you leave the restaurant?

A Around eleven.

Q And where did you go?

A To my mother's house.

Q And what is your mother's name?

A Jean Saccende.

THE COURT REPORTER: Would you spell that, please.

THE WITNESS: S-a-c-c-e-n-d-e.

THE COURT: S-a-z-z-e-n-d-e?

THE WITNESS: Double "C".

THE COURT: Double "C"?

THE WITNESS: Yes.

Q Where does she live?

A East 33rd Street and Avenue P.

Q In Brooklyn?

A Yes.

Q Anyon e else there?

A Yes.

Q Who was there?

A My mother's friend, Rita Small.

Q And so now there were four of you there, Mr. Setter as well?

A Yes.

Q What did you do there?

A My mother had a cake for me. We drank. Joe got sick and we spoke and then around one o'clock we went home.

Q Now, during the day before you went to the restaurant were you and Mr. Setter home all day?

A well, I believe he was at work and I went to see him and then the rest of the day we went home.

Q Were you in the house all day?

A Yes, I was.

Q Did you have any visitors that day at all?

A None.

Q Were you there at all times when Mr. Setter was there?

A Yes.

MR. KLEIN: I have no further questions,

your Honor.

THE COURT: Cross-examination, Mr. Appleby.

CROSS-EXAMINATION

BY MR. APPLEBY:

Q Miss Pernice, you live with Mr. Setter -- you've lived with Mr. Setter?

A Yes, I do.

Q On April 28th?

A Yes.

Q Is that right?

A Yes.

Q And you lived in that -- you occupied the entire house with him?

A Yes.

We oecupy the upstairs. His mother and- father occupy the downstairs.

Q Your quarters were on the top floor and his parents' quarters were on the bottom floor. Is that correct?

A Yes.

Q And where was yours and Mr. Setter's bedroom?

A Toward the back.

Q Toward the rear of the house?

A Toward the rear of the house.

Q Describe the house for us just a little bit, for us, the physical layout.

A. Well, there is a kitchen area and dining area.

Q How is the kitchen area in relation to the dining area?

A The kitchen area is here.

Q You come in the door?

A You come in the door.

Q Where is the kithhen?

What is on the right?

A The kitchen. On the left is the dining area and then the living room.

Q Where is the kitchen area in relation to the kitchen and the dining room?

A You walk in a little path and you're in there.

Q In the rear, towards the rear?

A Yes.

Q Did you hear Detective Copeland's testimony?

A No.

Q You don't know Detective Copeland?

A No.

Q You don't recognize this man?

A No.

Q Detective Copeland testified -- he described your house as well and he said there was a rear bedroom. Is there also a closet in that bedroom?

A Yes.

Q Where is the closet in the bedroom?

A There are more than one closet.

Q I see.

Tell us where each of those closets are.

A One to the right --

Q It's not important. Strike it out.

Is there a closet which contains a file cabinet?

A Yes.

Q And how many drawers does that file cabinet have?

A I don't know.

Q Have you ever seen the file cabinet?

A Yes, I have.

Q Three or four drawers?

A Yes.

Q Is it an ordinary steel file cabinet?

A Yes.

Q And whose belongings are in this file cabinet?

A Both mine and Joe's.

Q I see.

Where did you put your belongings, which drawer?

A I don't know. I didn't put them in. Joe -- I asked him to put them away for me. I don't know which drawer he put them in.

MR. APPLEBY: Would you please read back the last answer, Mr. Reporter.

THE COURT: Read it back.

(The Court Reporter reads back the requested portion.)

THE COURT: Try to keep your voice up because you're dropping your voice and some of the jurors may not even hear you.

THE WITNESS: I am a little nervous.

THE COURT: I'm sorry?

THE WITNESS: I am a little nervous.

THE COURT: I am sure you are.

Q Miss Pernice, what belongings of yours are in the file cabinet?

A I had diet pills that were prescribed from my doctor and a sedative that was prescribed from my doctor and a laxative.

Q And you did not -- from time to time you need these pills for medical purposes. Is that correct?

A Yes.

Q Do you ever go to that cabinet yourself to get those pills?

A On occasion.

Q You do? Joe wouldn't get it for you?

A If I asked him to; yes, he would.

Q Joe on occasion would get those pills for you?

A Yes, Joe gets it for me.

Q Most of the time he gets it for you?

A Yes.

Q Do you have any other belongings in the file cabinet?

A No.

Q That's the only thing of yours that's in the file cabinet?

A Yes.

Q Do you know what else is in the file cabinet?

A No.

Q Well, in what drawer are the pills that

you need?

A Top drawer.

Q The top drawer?

A I believe. I am not really sure.

Q You're not really sure which drawer they are in?

A No.

Q How often do you go into the cabinet to get these pills?

A I do not no longer take them so -- could you repeat the question?

Q Yes.

MR. APPLEBY: Mr. Reporter.

(The Court Reporter reads the requested portion.)

A Not very often. Maybe once or twice I have gone there myself.

MR. APPLEBY: Your Honor, I wonder if I can get the question. I forgot my own question and I don't know what that answer was in response to.

THE COURT: How often she went into the file cabinet.

Q Not very often?

A No, not very often.

Q Are you still continuing to go to the file cabinet? Is that corrrect?

A I have no use to. I no longer use these pills.

Q I see.

When did you stop taking these pills?

A Six months ago, whatever.

Q Those pills still there?

A NO.

Q You stopped taking these pills approximately six months ago?

A I don't know if it's approximate. Around then.

Q Well, six months ago would be what?

MR. KLEIN: November.

Q November of 1975, is that approximately right, in the winter?

A I am not sure.

Q Well, let's go back to July of 1975, specifically July 3, 1975.

I assume that's almost, almost a year ago?

A Yes.

Q At that time you were going to the file cabinet?

A I told you, I only went to the file cabinet only

once or twice myself.

Q Only once or twice?

A Yes.

Q Well, one of these occasions occurred on or about July 1975?

A Pardon me?

Q Did one of these occasions occur in July of 1975 or thereabouts?

A I don't recall when it was.

Q Well, it was before -- it was prior to about six months ago. Isn't that correct?

A Yes.

Q When did you first purchase the pills?

A I have been -- I was on medication long before I met Joe, so I kept getting the prescriptions every two weeks.

Q When did you move into Joe Setter's house?

A A year and a half ago.

Q So that would be approximately March 1975?

A Yes.

Q And when you first moved in --

THE COURT: No. That would be probably November of 1974.

MR. APPLEBY: Is that right? Excuse me.

THE COURT: November, December '74.

That's what you're talking about. It's not marked.

It's November or December.

THE WITNESS: Then it wasn't a year and a half, it was less than that.

Q Try to recall approximately when you move into the house?

A May of '75.

Q May of '75?

A It was '75.

Q And at that time you were taking these pills?

A Yes, I was.

Q And from time to time you would have to go to that file cabinet to get those pills?

A. I told you, I only went to the file cabinet once or twice.

THE COURT: Mr. Appleby, I hate to interrupt you.

MR. APPLEBY: All right.

THE COURT: These pills were given to you by the doctor. What was the medical instruction? What did the doctor state to you

as to how often you were to take the pills?

THE WITNESS: The diet pills, three times a day; and the sedatives twice. He didn't say how many times. It just said take two.

THE COURT: Take two how often?

THE WITNESS: It didn't say how often.

THE COURT: It's when you need them, you take two?

THE WITNESS: Yes.

THE COURT: That I can understand.

The diet pills you take if you want to take them?

THE WITNESS: If I wanted to take them.

THE COURT: All right.

You may continue.

Q So you went to this cabinet just a couple of times; is that correct?

A Yes.

Q Tell us everything you saw in that file cabinet, please.

A Files, papers; that's it mostly, and pills.

MR. KLEIN: I didn't hear the last of the answer, your Honor.

THE COURT: Files, papers and pills.

Q Miss Pernice, did you ever see a white substance in that file cabinet?

A No, I never did.

Q You're absolutely positive of that?

A I'm absolutely positive.

Q Do you recall ever going to the file cabinet in approximately July 1975?

A No, I don't.

Q Have you ever seen cocaine in your life?

A Yes, I have seen cocaine.

Q Where have you seen it?

A Where have I seen it?

From people that I know I have seen it, that I used to know.

Q These are at parties?

A Yes.

Q These people at these parties would ingest cocaine?

A Ingest?

Q Ingest cocaine in some form or another?

A Yes.

Q Did you on occasion take cocaine?

A Yes.

Q Did Joe Setter on occasion take cocaine?

A Not to my recollection, no.

Q Was he at these parties with you?

A No.

This is before I knew him.

Q I see.

So the only time you saw cocaine is at parties with friends of yours before you met Joe Setter?

A Yes.

Q But you have taken cocaine?

A Yes, I have tried it.

Q When did you stop taking cocaine?

A Approximately two years ago. I don't indulge in any drugs.

Q YOU don't take any drugs at the moment:

A No.

Q And since you met Joe Setter you have never seen cocaine?

A No.

Q You positive of that?

A Positive.

MR. APPLEBY: One moment, if your Honor please.

THE COURT: Sure.

(A pause)

MR. APPLEBY: Thank you.

Q Now, Miss Pernice --

THE COURT: One moment, Mr. Appleby.

MR. APPLEBY: Yes, your HOnor.

(Whereupon, the Court makes a telephone call from the courtroom telephone.)

THE COURT: Forgive me, please, I had to make that call.

Q Miss Pernice, did you say you moved into the house approximately May of 1975?

A Around there.

Q Could it have been before or after or what?

A It could have been before.

Q It could have been before, but you're not sure?

A No.

Q Does Mr. Setter own a cat, incidentally?

A Yes, he does.

Q A Siamese cat?

A No.

Q What kind of cat?

A Persian and domestic.

Q Now, just to let me get a clear idea of

this house, Mr. Setter's parents live in the same house. Isn't that correct?

A Yes, it is.

Q Do they live on the- ground floor or do they live beneath the ground floor -- I mean-- well, let me ask you this --

THE COURT: You mean street level?

MR. APPLEBY: Yes, that's what I mean, street level.

A Like a basement apartment. They live in like a basement apartment.

Q And you and Mr. Setter live in like the street level?

A Yes.

Q I see.

Does Mr. Setter own a terry cloth robe?

A Yes.

Q Do you recall what color it is, incidentally?

A Yellow.

Q Now, you were aware, of course, when the indictment in this case came down, weren't you -- strike that.

Miss Pernice, let me ask you this: There

came a time when you went to Cooky's Restaurant. Isn't that correct?

A Yes.

Q And you left that approximatelywhat time?

A Around eleven.

Q You left for Cooky's around eleven?

MR. KLEIN: LeftCooky's at eleven.

Q I'm sorry. I'm talking about when you left Mr. Setter's residence to go to Cooky's.

A Around nine.

Q Around nine o'clock?

A Yes.

Q Any doubt in your mind it was nine o'clock?

A No doubt.

Q And you got to Cooky's at approximately what time?

A Not long after nine, because it's not far from our home.

Q And approximately how long is it --how long does it take to go from your house to Cooky's?

A Five to ten minutes.

Q What kind of restaurant is Cooky's, incidentally?

A Do you mean what type of food?

Q Is it a fast food place or fancy restaurant?

A It's a -- like steak, steak and brew.

Q It's a chain type restaurant?

A Excuse me?

Q It's one of these chain type restaurants? There are a number of Cooky's at various locations in New York?

A Yes.

Q And approximately how long do you stay at Cooky's and eat?

A A couple of hours.

Q A couple of hours.

And then approximately what time did you leave Cooky's?

A Around eleven.

Q And you then went to Miss Kennedy's house. Is that correct?

A Miss Saccende's, yes; that's correct.

Q And approximately what time did you arrive there?

A Between eleven and eleven-thirty.

Q So it is possible that you could have

gotten there at eleven-thirty?

A Gotten where?

Q To Miss Saccende's house at eleven-thirty?

A I would say a little before eleven-thirty.

Q What makes you so sure it's closer to eleven-thirty?

A Because it doesn't take that long to get from Cooky's to my mother's house.

Q And you remember specifically leaving Cooky's at eleven?

A Yes, I do.

Q And how do you recall leaving Cooky's at eleven?

A Because I had a watch on.

Q I see.

And you recall as you sit here in this courtroom today, you remember looking at your watch when you left Cooky's?

A I look at my watch all the time, yes. Yes, I recall looking at my watch.

Q And you specifically remember looking at your watch at eleven p.m. when you leftCooky's?

A I looked at it before eleven p.m. and we were

through with dinner.

Q And you specifically remember doing that?

A Yes, I do.

Q Now, are you aware of the testimony that the agents left Mr. Setter's residence on the 28th--I'm telling you the agents left Mr. Setter's residence on the 28th approximately eleven-fifteen they ended their surveillance? Are you aware of that testimony?

A That the agents testified to?

Q Yes.

A I am not aware of anything they testified. I never heard anything.

Q I see.

Are you living with Mr. Setter right now?

A Yes, I am.

Q Have you discussed the case during this trial?

A Yes.

Q Has Mr. Setter informed you of the testimony that has gone on at the trial?

A Yes.

THE COURT: That wouldn't mean she knows any specific points.

Q Have you discussed Mr. Setter's alibi defense with him?

A No, I haven't.

THE COURT: It's her testimony we are talking about. Don't put it that way.

Have you discussed her testimony with him, that's what?

THE WITNESS: What does he mean?

THE COURT: He means, have you discussed your testimony with Mr. Setter?

THE WITNESS: No, I haven't.

THE COURT: You have spoken with him?

THE WITNESS: Yes, I have spoken to him about the case.

THE COURT: You have spoken to him about what you are going to say?

THE WITNESS: Why should I speak to him about what I am going to say?

THE COURT: You know it anyway?

THE WITNESS: Yes.

THE COURT: I'm sorry, I'm very sorry.

Q Were you aware that Mr. Setter was trying to line up alibi witnesses for himself?

MR. KLEIN: I object to that.

THE COURT: Please, objection sustained. You're asking a specific question.

MR. APPLEBY: All right.

Q Did Mr. Setter ever tell you he was looking for alibi witnesses?

MR. KLEIN: Again, your Honor.

THE COURT: That's objectionable, please. If you haven't got anything else to say, that's it.

MR. APPLEBY: May I have a moment, your Honor?

THE COURT: Surely.

(A pause)

MR. APPLEBY: Thank you very much, Miss Pernice.

THE COURT: Wait.

Do you have anything?

MR. KLEIN: Yes, sir.

THE COURT: All right, Mr. Klein

REDIRECT EXAMINATION

BY MR. KLEIN:

Q Referring to July 3, 1975, did your uncle die around that time?

A Yes, he died a few days before that.

That was the day of the burial.

Q They had the burial when, July 3rd?

A Yes.

Q And what -- did you sleep in the house on July 2nd, the night of July 2nd?

A Yes.

Q And what time did you leave the house to go to the funeral on July 3rd?

A Around eight-thirty.

Q Did you step out of the house and go?

A Yes.

Q And did you leave Mr. Setter back in the house?

A Did I leave him in the house?

Q He was still in the house when you left?

A Yes.

(Counsel confer with each other out of the hearing of the Court Reporter.)

THE DEFENDANT: Mr. Klein.

(Mr. Klein and the defendant confer out of the hearing of theCourt Reporter.)

Q Before you met Mr. Setter -- excuse me, there has been some talk about you being familiar with cocaine. You had been at parties with people

using it before you met Mr. Setter?

A Yes.

Q Before you met Mr. Setter were you a methadone patient?

A Yes.

Q And for how long have you been or had you been a methadone patient?

A Around four or five years.

Q And have you completed your methadone treatment?

A Yes, I have.

Q And are you completely cured of that particular addiction that you had?

A Yes.

Q And do you know the name of the doctor that gave you a prescription for these diet pills -- and sedatives or laxatives, whatever they were?

A Well, for the diet pills the doctor was Dr. Parnes. And the sedatives, it was a clinic, a medical clinic. There were all different doctors, so I don't recall their names.

Q Did you find that when you went through the methadone program, when you finished you had put on some weight?

A Yes.

Q Do you know that in your absence on July 3rd agents came to your house and arrested Mr. Setter?

A Do I know?

Yes, I know.

Q You had been informed of it?

A Yes.

Q You weren't there?

A No, I wasn't.

Q Do you know now that the pills, that your prescription pills that you had in that file cabinet are no longer there? Do you know whether they were seized by the agents?

MR. APPLEBY: I will -stipulate there were pills there as well.

As a matter of fact, if you want, I will give you the report with reference thereto.

Q Were the pills that were seized your pills?

A Yes, they were.

Q And these were prescription pills which a doctor prescribed to you?

A Yes, they were.

Q Do you recall when you first met Mr. Setter, what month it was?

A Yes.

Q When?

A July 24, 1975.

Q Something is wrong here.

THE COURT: You have the wrong date, July 24, 1975.

THE WITNESS: Well, this is '76.

THE COURT: We are in '76 now.

What day are you asking her for?

MR. KLEIN: When she first met Mr. Setter.

THE COURT: Yes. Do you recall when you first met Mr. Setter?

Q If you were living with Mr. Setter on July 3 --

A I'm sorry, January, January 24th.

Q And how long after that did you --

MR. KLEIN: Thank you very much, your Honor. I appreciate it.

THE COURT: It's perfectly all right. I saw she was confused.

Q And how long after that did you and Mr. Setter move in together?

A Not long -- well, before I moved in, I was there most of the time anyway.

Q All right.

Did you meet an officer who testified here the other day in the corridor named Mr. Richel?

A Bob.

Q Bob Richel?

A Yes.

Q He introduced himself to you?

A He didn't know who I was. I met him in the corridor.

Q He didn't know you were Mr. Setter's fiancee at the time?

A No, he didn't.

Q Did he have a conversation with you?

A Yes.

Q What did he say?

A He said that he was going to be a witness and I asked him, are you going to be a witness against or for. And he said for -- I mean against. And I asked him how the trial looked.

Q Did he say anything about a scale?

A Yes.

After I told him who I was, I asked him if

Q How many people could have used that

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he took my scale, which is an antique.

Q And what did he say?

A He said yes. I can't remember where he said they had it. He recalled the scale and he described it to me.

Q You describe it. What is it?

A It's around this big (indicating), and that high and it's gold.

Q Is it an antique?

A Yes.

Q To your knowledge, since you know Mr. Setter, have you ever known him to deal in narcotics of any kind?

A Never.

Q Is that closet where the file cabinet is, is that cluttered or is it neat?

A Well, it has clothes -- it's cluttered.

Q And in the file cabinet, is it Mr.Setter's documents and papers and checkbooks and corporate records and everything?

A Yes.

MR. KLEIN: I have no further questions, your Honor.

THE COURT: As to that file cabinet, is that

cabinet kept locked or is it unlocked at all times?

THE WITNESS: Unlocked.

THE COURT: It's unlocked?

THE WITNESS: The file cabinet?

THE COURT: Yes.

THE WITNESS: I really don't know if it's kept locked or not.

THE COURT: You don't know if it's kept locked or not?

THE WITNESS: No.

THE COURT: The times you went there were you able to open it?

THE WITNESS: There is only one drawer that locks.

THE COURT: There is only one drawer that locks?

E WITNESS: Yes. When I went there I was able to open it.

THE COURT: For what you wanted?

THE WITNESS: Right.

THE COURT: Now, for the one drawer, did you have a key?

THE WITNESS: No.

THE COURT: Is that one drawer locked at all times?

THE WITNESS: I don't know.

THE COURT: You don't know?

THE WITNESS: No.

THE COURT: But you have a key for it?

THE WITNESS: No, I don't have a key for it.

BY MR. KLEIN:

Q Is that one drawer -- the pills, when you wanted to take a pill, on those occasions when you wanted to get one of your prescribed pills from the cabinet, it was in drawers that weren't locked?

A Right, yes.

RECROSS-EXAMINATION

BY MR. APPLEBY:

Q That was the top drawer?

A Yes.

Q And that was unlocked?

A Yes.

Q When you went to get the pills, were the pills contained in a shoe box?

A No, they were not.

Q It was not within a shoe box?

A No.

Q And you have never seen a triple beam scale in Mr. Setter's residence?

A A what?

Q A triple beam scale. Do you know what that is?

A No.

MR. APPLEBY: No further questions.

MR. KLEIN: One last question.

FURTHER REDIRECT EXAMINATION

BY MR. KLEIN:

Q Was Mr. Setter instrumental in helping you with your rehabilitation on this methadone program? -- and getting off that habit?

A Yes.

FURTHER RECROSS-EXAMINATION

BY MR. APPLEBY:

Q In other words, at the time you met Mr. Setter you were still taking narcotics?

A I was using methadone. I wasn't taking anything else.

MR. KLEIN: She was on the methadone program for five years.

THE WITNESS: I was on the methadone pro-

gram legally.

Q And Mr. Setter was helping you get off methadone?

A If it wasn't for Mr. Setter I might not be here.

MR. APPLEBY: No further questions.

THE COURT: You say the scale you had, Miss Pernice, was an antique scale?

THE WITNESS: Yes.

THE COURT: And how would you describe the scale?

THE WITNESS: It's a gold scale with two pieces that lift up and it has weights on the bottom.

Q And where do you put the -- when you're weighing something where do you put it? Are there two sides you put it on or one side? Are there two surfaces?

THE WITNESS: Yes, there are two sides.

THE COURT: And you put the one on one side and the weight on one side and the item you are weighing on the other side, something of that nature?

THE WITNESS: If that's how it's used .

I never weighed anything on it.

THE COURT: Anything further?

MR. KLEIN: No, sir.

MR. APPLEBY: Thank you, thank you.

THE COURT: Do you have anything further?

MR. KLEIN: I have two short character witnesses.

THE COURT: You have two short character witnesses?

MR. KLEIN: Yes.

THE COURT: Maybe we can take those.

(Mr. Klein confers with the defendant out of the hearing of the Court Reporter.)

MR. KLEIN: Those are alibi witnesses, your Honor; I'm sorry.

THE COURT: Maybe we better adjourn.

Ladies and gentlemen, we are going to adjourn. Of course, Monday is a holiday, so it's three days. And we will resume on Tuesday.

Now, Tuesday I believe I have a calendar.

Whileyou're away, please do not discuss the case.

Tuesday you can come in at 11 o'clock.

COLLOQUY
MORNING SESSION

(June 1, 1976)

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(The following takes place out of the presence of the jury.)

MR. KLEIN: Before you bring the jury down, I have spoken with Mr. Appleby and asked him about Agent Ebert, if you recall.

THE COURT: Yes. What is our situation?

MR. APPLEBY: Your Honor, I offered to stipulate in a matter that I think is satisfactory to Mr. Klein. As a matter of fact, I think it would be more helpful to him than if he would be called.

THE COURT: It's up to him.

MR. KLEIN: It will be all right just to read a portion of Agent Ebert's Grand Jury testimony, and he would concede that if he were here that would be the testimony.

THE COURT: That's all right. You will read it.

MR. APPLEBY: I want to point out that I turned over his testimony, although he wasn't a witness in the Government's case.

THE COURT: That was at the outset of the

case. A-585

MR. KLEIN: After the preliminary hearing, though.

THE COURT: That's when he is supposed to. He doesn't have to before.

MR. KLEIN: I know that.

THE COURT: It's not part of the preliminary hearing.

MR. KLEIN: Sometimes we run into a conflict with Brady and--

THE COURT: I am not talking about some other situation. I am talking about this situation.

MR. KLEIN: Even in this situation.

THE COURT: Was there a conflict?

MR. KLEIN: I think so.

THE COURT: All right.

You have it and you are going to read it.

MR. KLEIN: Yes, sir.

THE COURT: Are we ready to proceed?

MR. KLEIN: Yes, sir.

THE COURT: Bring in the jury.

MR. APPLEBY: I have a few questions to ask of Mr. Meltzer. That's it.

(The jury enters the courtroom and the

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following takes place in open court and in the presence of the jury.)

THE COURT: Good morning, ladies and gentlemen.

I think, Mrs. Lifer was a little late getting here. However, after that my reporter had to be sent for and then we had a legal problem and we will proceed at this time.

Yes, Mr. Appleby.

MR. APPLEBY: I would like to call Mr. Meltzer to put in a few documents.

THE COURT: Come up, Mr. Meltzer.

B E R N A R D M E L T Z E R, having been previously sworn, resumes the stand and further testifies as follows:

THE COURT: You are reminded you are still under oath.

THE WITNESS: Yes, sir.

THE COURT: You may be seated.

FURTHER RECROSS EXAMINATION

BY MR. APPLEBY:

Q Mr. Meltzer, I believe the Court asked you to bring in a plate, license plate that read, 42-851, a New York dealer plate. Did you find that plate?

A Yes. A-587

MR. APPLEBY: I am not going to identify this, your Honor, or put it into evidence. I think we can just state the fact on the record with respect to the license plate.

THE COURT: Are you aware of this, Mr. Klein? Are you aware of the plate?

MR. KLEIN: Yes, that he has the license plate, yes, sir.

THE COURT: I didn't know whether you were aware of it or not.

MR. KLEIN: Yes, sir. Thank you very much.

Q I show you a New York license plate that reads 42-852 and at the bottom, New York dealer.

(Handed to the witness.)

Q Is this the license plate you found and brought in?

A Yes.

Q And did Exclusive Motors have possession of this license plate in April of 1975?

A Yes.

Q Furthermore, Mr. Meltzer, you brought in the police book that is in the custody of Exclusive Motors. Is that correct?

A-588

A Yes.

Q I refer you--is this the police book I am showing you now?

(Shown to the witness.)

A Yes.

Q A black book. Is that correct?

A Yes.

Q I show you the page that's numbered number 36 at the top right hand corner. I show you that page first and then I will ask you to look at the page opposite that page and direct your attention to the third entry.

Is there an entry there for a 1972 Eldorado Cadillac, yellow in color?

A Yes.

Q Now, was that--

THE COURT: What is the date of that entry?

MR. APPLEBY: I was just going to get to that, your Honor.

THE COURT: I'm sorry.

Q The date of that entry is May 16th, 1975. Is that correct?

A Yes.

A-589

Q I see, however, that the automobile was purchased from M & M Auto Sales at 5622 Church Avenue, Brooklyn, New York. Is that correct?

A Yes.

Q And how did it come about that you had purchased this automobile from M & M Auto Sales?

A We have a buyer that goes on the road and purchases cars.

Q Did you have this yellow Cadillac in your possession prior to the purchase date?

A I couldn't tell without the records.

Q Do you purchase automobiles on consignment?

A Yes, sometimes.

Q Can you tell the members of the jury what it means to purchase an automobile on consignment.

A Sometimes we will take a car from the dealer and hold the car into our possession until the time of the sale of the car.

Q And when there is an entry that reflects the purchase date, it's possible that the automobile would be or could be in your possession prior to the purchase dates that you had it on consignment. Is that correct?

A It's possible.

R-590

Q Now, is M & M Auto Sales one of the firms from which you purchased automobiles on consignment?

A Yes.

Q And is it possible that this yellow Eldorado Cadillac could have been in your possession in April of 1975 because it was purchased on consignment?

A Yes--excuse me, for when?

Q I asked you whether it's possible, if you had possession of that yellow Cadillac in April of 1975 because you had it on consignment?

A Possible.

Q Yes?

A Yes.

THE COURT: Would you like to ask anything further of this witness?

MR. KLEIN: Yes.

I would like to introduce in evidence the papers Mr. Meltzer brought in the other day which were marked for identification.

THE COURT: Any objection?

MR. APPLEBY: No, your Honor.

THE COURT: All right.

Received in evidence on behalf of the defendant, papers previously marked for ident-

ification. A-591

THE CLERK: He has one set, D, and the Government has the other set, 25 and 26, which were marked for the Government.

THE COURT: Just his set.

MR. KLEIN: My set.

Do you want to offer the others, Mr. Appleby?

MR. APPLEBY: I have no objection to offering anything.

THE COURT: All right.

They are received in evidence, both sets; one on behalf of the Government and the other on behalf of the defendant.

THE CLERK: Defendant's Exhibit D, previously marked for identification, received in evidence.

(So marked.)

THE CLERK: Government's Exhibit 25 and 26, previously marked for identification, received in evidence.

(So marked.)

FURTHER REDIRECT EXAMINATION

BY MR. KLEIN.

A-592

Q How many people could have used that plate?

A Any number of people.

Q Do you have any record who used the plate at any particular day or any particular time of day?

A No.

Q Do you have any record which car that plate was on?

A It could be any number of cars.

Q I didn't hear the answer.

A It could be any number of cars.

Q Where did this Eldorado sit?

A On the lot.

Q Where on the lot?

A I don't know exactly. It could be any position.

Q Any work had to be done on this car when you bought it?

A I don't recall. Every car that we buy needs work.

Q Anything wrong with the axles on this car?

A Axles? This is the car that needed the axle repair.

Q The axle repair?

A Yes.

Q How long was it laid up awaiting repairs?

A I don't recall.

Q When was the work completed on it?

A I would have to refer to the sheets.

Q That would be in those sheets we just offered in evidence, wouldn't it?

A Yes.

THE COURT: Which car is this?

MR. KLEIN: An Eldorado, Cadillac Eldorado.

Q The 25th seems like the day, April 25th.

A 24th.

Q Excuse me, 24th.

THE COURT: Of what month?

THE WITNESS: April.

THE COURT: What year?

THE WITNESS 75.

THE COURT: Continue.

Q And how long had that car been laid up until that work was done? How long before that had it been sitting there?

A Several days. We would have to requisition parts for it.

THE COURT: That means--excuse me, at that time you had the car on assignment or on

A-594

consignment?

THE WITNESS: Yes.

THE COURT: Is that what it means?

THE WITNESS: Yes.

THE COURT: On that date?

THE WITNESS: Yes

THE COURT: And prior to that date?

THE WITNESS: Yes.

THE COURT: I'm sorry, Mr. Klein.

MR. KLEIN: Yes. We were both going in the same direction, I think. It's all right.

Q Is it possible on April 17th, the week before the work was done on the 24th, that that car was immobile in that lot awaiting repairs?

A Yes, it is; the car is immobile.

Q The car was immobile?

A Yes.

Q In other words, the car didn't become mobile until after the 24th?

A Yes.

Q So that on April 17th that car could not have left that lot. Is that right?

A Not to be driven, no.

A-595

Q It could have been towed?

A It could have been towed, yes.

Q In other words, in that book you say there is a yellow Cadillac Eldorado. Is that a specific yellow or it could have been a beige or brown?

A That's a misnomer. It wasn't yellow, it was beige.

Q Let's get back to the other car, the Mercedes.

The actual work, after you ordered the parts for the Mercedes and waited for the parts to come in, then Mr. Setter was on vacation and finally the work was done on the Mercedes. Is that right?

A Right.

Q And that was beyond the 30 days of the warrantee?

A Right.

Q And I believe you sold that car to that man on February 5th?

A Right.

Q So that 30 days would have been March 5th?

A Thereabouts.

A-596

Q Now, is it possible or do you recall whether that man, Mr. Schlissel (phonetic spelling), is that his name?

A Yes.

Q Whether Mr. Schlissel, the purchaser of that car, came in and complained before the 30 days was up?

A Constantly.

Q What?

A Constantly.

Q He would complain constantly within that 30 day period?

A Yes.

Q So he was within the warrantee, although you did the work after the expiration of the warrantee?

A Repeat that, please.

Q He made his complaint to you within the time period of the warrantee. Is that correct?

A Yes.

Q You didn't do the work until later?

A Right.

MR. KLEIN: I have no further questions, your Honor.

THE COURT: Any questions?

A-597

MR. APPLEBY: Just one question.

FURTHER RECROSS-EXAMINATION

BY MR. APPLEBY:

Q Mr. Meltzer, didn't you tell us you had no yellow Cadillac in your possession at any time during 1975?

A You asked me to look for a 1974 yellow Cadillac and we did not have a 1974 yellow Cadillac.

Q And that's why you told us you had no yellow Cadillac in your possession?

A I specifically looked for a 1974 yellow Cadillac, yes.

Q And that entry is what, for 1972?

A 1972.

THE COURT: What else does it say?

THE WITNESS: It says 1972 Cadillac Eldorado, 2-door, yellow.

THE COURT: Anything further?

MR. APPLEBY: No.

THE COURT: Do you want these records or do you think they are needed for any purpose?

MR APPLEBY: I think--

MR. KLEIN: They are Exhibits. I don't know if the jury would want them later on or not.

A-598

MR. APPLEBY: I expect to be very short.

(The following takes place in open court and in the presence of the jury.)

R I T A S M A L L, sworn.

DIRECT EXAMINATION

BY MR. KLEIN:

Q Mrs. Small?

A Yes

Q Do you know Joseph Setter?

A Yes, I do.

Q Do you know Debbie Pernice?

A Yes, sir

Q Do you know Mrs. Saccende, Debbie's mother?

A Yes.

Q Who is Mrs. Saccende?

A A friend of mine.

Q Is she Debbie's mother?

A Yes.

Q Do you recall Debbie's birthday in 1975?

A Yes, I [illegible]

Q April 27th, the day?

A 28th

A-599

Q April 28th or 27th?

A Well, I'm not sure. I think the 28th.

Q Do you recall where you were that night or that day?

A Yes, I do.

Q Do you have anything to do with celebrating Debbie's birthday?

A Yes, it does.

Q Where did you go to celebrate her birthday?

A Mrs. Saccende's house.

Q Mrs. Saccende invite you?

A Yes, she did.

Q And what time is Debbie supposed to come--did she come in?

A She was supposed to be there about 11:00--well, they went out to dinner, her mother told me.

MR. APPLEBY: I will object to that last testimony. She said her mother told me.

THE COURT: Sustained, and the jury is instructed to disregard that portion of it.

Q You can't tell us what Debbie's mother said, only what you observed.

A Okay.

A-600

Q Did you observe Debbie and Joseph Setter there that evening?

A Yes, I did.

Q Where is her house located? What is her address?

A 5069 East 33rd Street.

Q In Brooklyn?

A Right.

Q Right.

And did they come together, Debbie and Joseph?

A Yes, they did.

Q What time did they get there?

A Between 11;00 and 11:30.

Q And how long did they stay? Do you know?

A Till about 1:00 or a little after, because I left right after them.

Q Did you know that was Debbie's birthday that night?

A Yes.

Q Was there a birthday cake?

A Yes, there was

Q Who made the birthday cake?

A-601

A Mrs. Saccende.

Q And did you toast on her birthday?

A Yes, we had a few drinks and after we had coffee and cake.

Q Mrs. Small, did you speak to some agents in this case or an agent or Mr. Palmieri (phonetic spelling) or any other officer?

A Yes, I did.

Q And did he ask you about the events of that night, ask you the same questions?

A Yes.

Q And did you tell him the same answers?

A Yes, I did.

MR. KLEIN: I have no further questions, your Honor.

THE COURT: Cross-examination.

MR. APPLEBY: Very brief, your Honor.

CROSS-EXAMINATION

BY MR. APPLEBY:

Q You stated Mr. Setter and Debbie Pernice arrived at between 11:00 and 11:30?

A Yes.

Q It's possible they could have arrived after 11:15 P.M.?

A-662

A It's possible.

MR. APPLEBY: No further questions, your Honor.

THE COURT: Anything further?

MR. KLEIN: No, sir.

THE COURT: Thank you, thank you.

You may proceed, Mr. Klein.

MR. KLEIN: Mrs. Small, on your way out send Mrs. Saccende in.

THE WITNESS: Yes.

MR. KLEIN: Would you call her in, please.

THE WITNESS: Yes, sure.

MR. KLEIN: Thank you.

(The witness is excused.)

J E A N S A C C E N D E, sworn.

DIRECT EXAMINATION

BY MR. KLEIN:

Q Mrs. Saccende, are you Debbie's mother?

A Yes.

Q Do you know Joseph Setter?

A Yes, I do.

Q Do you recall--when is your daughter's birthday?

EXCERPTS FROM TRIAL TESTIMONY - JEAN SACCENDE



A-603

A April 28th

Q 28th?

A Yes

Q Do you recall celebrating her birthday last year in 1975?

A Yes.

Q And do you recall seeing Debbie and Joseph sometime that evening?

A Yes.

Q And who else was present?

A Rita Small

Q And where did this take place?

A My home

Q And what time did Debbie and Joseph arrive--did they arrive together?

A Yes, they did

Q What time did they arrive?

A Between 11:00 and 11:30.

Q And you had a birthday cake?

A Yes.

Q How long did they stay?

A Somewhere up until about 1:00 o'clock.

MR. KLEIN: No further questions.

THE COURT: Cross-examination.

to me prior to going on the stand. He said he

COLLOQUY - RE: GRAND JURY TESTIMONY - AGENT EBERT



A-604

MR. APPLEBY: No questions, your Honor.

THE COURT: Thank you.

You may step down.

(The witness is excused.)

MR. KLEIN: Your Honor, at this time I ask you to please explain to the jury one of the Government Agents is out of town and unavailable and, therefore, I will read a portion of his Grand Jury testimony.

THE COURT: Yes.

There is an Agent Ebert who is a DEA Agent, Drug Enforcement Administration Agent, and we have tried to get him back, but he is out of town. So there is a portion of his Grand Jury testimony.

Is that correct?

MR. KLEIN: Yes, your Honor.

THE COURT: That Mr. Klein is going to read.

And the Government has agreed to this because of the unavailability of the Agent.

And you are to receive this just as if the Agent were here and testifying. And it's

of it inside.



A-605

testimony which is part of this case and which is evidence in this case.

You may read from it, Mr. Klein.

MR. KLEIN: Thank you, your Honor.

Do you want to follow along, Mr. Appleby?

MR. APPLEBY: No. It's all right.

MR. KLEIN: These are the questions that are being asked of Mr. Ebert and the answers he gave.

THE COURT: What is the date?

MR. KLEIN: The date is December 15 of 1975.

I am reading from Mr. Ebert's--Agent Ebert's Grand Jury testimony here in this case.

Mr. Appleby I believe was asking the questions and Mr. Ebert was answering.

On Page 5,

"QUESTION: After you advised him--"

Him is referring to Mr. Setter, and we are talking about the date--if your Honor please, one minute.

This is the date of the arrest on July 3rd. That's what the reference is made to. Is that correct, Mr. Appleby?

A-606

MR. APPLEBY: July 3rd is the arrest.

MR. KLEIN: I am reading in the middle so I don't want to cut you short.

"QUESTION: After you advised him of his Constitutional rights and placed him under arrest, where did the arrest take place?

"ANSWER: Outside.

"QUESTION: Of his residence?

"ANSWER: He was going to his automobile to depart. We decided to arrest him at that time.

"QUESTION: Then you advised him of his rights?

"ANSWER: Yes.

"QUESTION: What occurred thereafter?

"ANSWER: He was asked by Sgt. Rawald-- he was told what he was arrested for. He was asked if he had drugs on his person or his house.

"Yes, he had drugs in the house.

"QUESTION: What occurred thereafter?

"ANSWER: He asked if he could go into the house to secure the house. He wasn't

A-607

actually ready to leave. He was going to his car and he was going back in the house.

"We took him and went into the house.

"QUESTION: The purpose in his going into the house was twofold, one to attend to some personal affairs?

"ANSWER: Yes.

"QUESTION: And, two, to surrender the drugs he had in the house?

"ANSWER: Yes.

"When he went back into the--"

All right.

Do you want to read the other question? I think I should read it.

MR. APPLEBY: Finish the rest of the page.

MR. KLEIN: I think I should read it.

"QUESTION: When you went back into the house were you accompanied by an agent?

"ANSWER: Yes, we all went back into the house with him.

"QUESTION: What occurred thereafter?

"ANSWER: After he had taken care of his personal affairs he was asked about the drugs and he agreed to surrender them.

A-60F

At that time he went into the bedroom of the house and went into a closet and while we were watching, opened a locked file cabinet in the closet and took out a Tom McCan shoe box and handed it to us."

MR. APPLEBY: I may point out, your Honor, the reason Agent Ebert was not called in was he was not available. But we could have adjourned the trial for a week and tried to get him, but the Government agreed to stipulate in this matter.

THE COURT: Yes, and the jury is so informed. You may continue.

MR. KLEIN: That's the only part I wanted to read, your Honor.

THE COURT: Yes.

(Whereupon Mr. Klein confers with the defendant out of the hearing of the court reporter.)

MR. KLEIN: Excuse me a minute, your Honor.

THE COURT: It's all right.

(Mr. Klein continues to confer with the defendant out of the hearing of the court reporter.)

MR. KLEIN: Your Honor, I see another paper here from Mr. Meltzer--

A-609

THE COURT: Do you want to recall Mr. Meltzer?

MR. KLEIN: Yes.

THE COURT: Yes.

Come up, Mr. Meltzer.

B E R N A R D M E L T Z E R, previously sworn, resumes the stand and further testifies as follows:

THE COURT: You are still under oath, Mr. Meltzer.

MR. APPLEBY: I have no objection to the evidence going in without him going back on the stand.

FURTHER REDIRECT EXAMINATION

BY MR. KLEIN:

Q Mr. Meltzer, the other day we were talking about the lady who you said tried to stab you or something.

A Yes.

Q And you worked out some peaceable arrangement with her where you split the cost on her car?

A Yes.

Q Do you have the papers with you pertaining to that?

A Yes.

A-610

Q I ask you if those are the papers?

A Yes, they are.

Q Is there any agreement there about splitting the work? How about the paper in your right hand?

A It doesn't say anything about splitting the work, but it says we will give an additional thirty day guarantee.

Q You have the records pertaining to that. Is that right?

A Yes.

MR. KLEIN: Do you want them in evidence?

MR. APPLEBY: I have no objection if you want to put them in evidence.

MR. KLEIN: I don't want to clutter up the record. It's just corroboration, that's it.

THE WITNESS: I don't particularly need these records.

THE COURT: I am asking him if he needs them.

MR. KLEIN: I may as well, to be safe, offer them and then take them back in case he needs them.

THE COURT: All right.

What are these records? Explain them so

A-611

that we know.

THE WITNESS: This is a letter stating what repairs have been completed on a 1971 Oldsmobile Cutlass 442 owned by Mrs. Gloria Bell, and it's dated May 16th.

I have one dated May 7th stating that we received this '71 Olds 442 to be repaired for repair--to be repaired. It says we will renew the thirty day, 1,000 mile, 50-50 warrantee on the date of release.

The 50-50 warrantee indicates the customer will pay half and we will pay half.

And this is a notice from the Department of Consumer Affairs, City of New York, where Mrs. Gloria Bell, the complainant against--

THE COURT: She made a complaint against Exclusive Motors?

THE WITNESS: Yes.

THE COURT: Those are the papers?

THE WITNESS: Yes.

THE COURT. What is the date?

THE WITNESS: You know this better than I do.

(Handed to the Court.)

A-612

THE COURT: July 30, 1975; July 30.

THE WITNESS: We had to appear in August.

THE COURT: That's the date that's on it, that's the date, July 30, 1975.

MR. KLEIN: That's the date he received notice from the Bureau of Consumer Affairs.

THE COURT: That's the date of that paper. And he could have received it at any time that day or thereafter.

MR. KLEIN: They could have received the complaint at any time before?

THE COURT: But he asked me the date and I told him.

THE WITNESS: It was mailed to us on July 30th. The complaint was that on April 30th, 1975, that we, the dealer, delivered a '71 Oldsmobile not in perfect condition and she lists the various complaints, starter, fuel pump and battery. This is the complaint as of April 30th.

MR. APPLEBY: Of what year, Mr. Metlzer?

THE WITNESS: 1975.

And we were to appear on August 27th to answer the complaints.

THE COURT: From the day she got it she had

A-613

trouble, but the date of this paper is July 30th.

THE WITNESS: The date was mailed to us, yes.

THE COURT: That's the date?

THE WITNESS: This is a used motor vehicle warrantee.

THE COURT: What is the date of that?

THE WITNESS: The date of this sale of the car, 5-16.

THE COURT: May 16th?

THE WITNESS: Yes, 5-16-75.

MR. KLEIN: I will offer that as an exhibit.

THE COURT: Any objection?

MR. APPLEBY: No objection.

THE COURT: Received in evidence on behalf of the defendant.

Anything further from Mr. Metlzer?

MR. KLEIN: No, sir.

THE COURT: You may step down.

THE CLERK: Five-page document marked Defendant's Exhibit E in evidence.

(So marked.)

THE COURT: Yes.

A-619

MR. KLEIN: I wonder if we can excuse the jury for a moment and then I will ask for a short recess if I decide to put Mr. Setter on the stand.

THE COURT: All right.

We will take a short adjournment.

The jury may go out.

Please do not discuss the case.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

MR. KLEIN: Your Honor, in view of the nature of the Grand Jury testimony I just read of Agent Ebert, I would like to renew at this time my motion to suppress the evidence of the seizure on the day of the arrest, July 3rd. And it's very important I make it at this time rather than at the end of the case because I now come to a parting of the words. I have to make a decision on which defense to go on or whether or not to put Mr. Setter on the stand if I decide to go on one defense rather than another.

THE COURT: Surely.

MR. KLEIN: Mr. Ebert in front of the

A-615

Grand Jury just testified that the conversation as to drugs took place outside the house and that he had a twofold purpose, the agents had a two-fold purpose for going into the house; one was to secure the personal effects of Mr. Setter, and the other was to obtain the drugs that Mr. Setter had been asked about out in the driveway at the moment of arrest.

I say that changes the complexion because originally in the hearing it appeared that Mr.--that the question as to--that the only purpose of going into the house was merely an accomodation of Mr. Setter to secure some personal matters, and that after he was in the house then for the first time the agents said, "If you have any drugs or other drugs or narcotics, I suggest you turn it over." And then he turned it over. That was the original testimony.

And Agent Ebert, who was there, disputes that. Agent Ebert now says that this question about drugs took place outside the house while he was being arrested and they had drawn guns there.

They come into the house for a twofold

A-616

purpose, one of which being to obtain the drugs about which he had been questioned while he was being arrested. And so I say now the agents do not have--the police do not have any authority now to go into a house. They had plenty of time to get a search warrant. Because now if they think they had probable cause, they could have gone and obtained a search warrant. But what they did, they got an admission from him the drugs were in the house. They asked him the question and then they went in and searched the house. And I say that that search was now improper.

Instead of a voluntary turnover it was an improper and unlawful search and seizure.

And then to corroborate that there was another significant point and that is that this Agent Richel, Robert Richel had admitted to speaking to a young lady, Debbie, out in the corridor, and he did admit that the Agents do have possession of a scale that was in the premises.

THE COURT: When was this done and where?

MR. KLEIN: July 3rd.

A-617

THE COURT: When was this Richel admission you are speaking about?

MR. KLEIN: The day he testified or the day before.

THE COURT: This was last week?

MR. KLEIN: Yes, sir, last week.

THE COURT: And what now--what comes about from this, he said is to whom?

MR. KLEIN: Debbie Pernice. She testified to it yesterday--not yesterday, Friday. And you asked her to describe the antique scale and she described it, and it was gold and there were two platforms.

THE COURT: What was the statement to her and what was her statement?

MR. KLEIN: As best I can recall, he said to her, "We have the scale," an admission that they had the scale. And that could only come about from a seizure.

MR. APPLEBY: With all due respect, that is definitely not the testimony. The testimony is that we have many scales at the Task Force office.

SGT. RAWALD: Agent Richel mentioned this

A-618

to me prior to going on the stand. He said he was approached by Mrs. Pernice and she said or asked him if he had a scale, and he told her he didn't know, he wasn't present at the arrest, but if it was seized it would be at the lab and it would be returned to her. He didn't know what he had.

MR. KLEIN: On the stand I asked him that and he admitted it and Miss Pernice testified also to the conversation and they were talking about a specific gold antique scale. And your Honor asked her to describe the scale and she did.

MR. APPLEBY: With all due respect, so what?

MR. KLEIN: It means they went in and searched and seized. They didn't go to a particular drawer and wait to be handed a shoe box. They picked up something else on the way.

And my point is that it shows the nature of what took place there.

The main point is they knew outside the house that there were narcotics in there and they went in to search for the narcotics. It wasn't a surprise to them that they were first apprised

A-619

of it inside.

THE COURT: Anything else?

MR. KLEIN: That's it, your Honor.

I respectfully renew my motion.

THE COURT: Mr. Appleby, I will hear you on this application by Mr. Klein.

MR. APPLEBY: The first thing, your Honor, Mr. Klein had pointed out a minor inconsistency in Agent Ebert's testimony in the Grand Jury.

Agent Ebert in the Grand Jury is testifying as to a hearsay statement that was made by Sgt. Rawald. So obviously he couldn't be entirely accurate.

Sgt. Rawald is the one who is in the best position as to what was said, and if there is an inconsistency, so what, there is an inconsistency. It doesn't disturb the fact that the defendant voluntarily handed over the cocaine inside the house. It doesn't change that one bit whatsoever. It's another smoke screen and a minor inconsistency offered by the defendant, your Honor.

MR. KLEIN: There is no smoke screen here and I don't think that's called for.

quite a mass, so I have to handle them as issues.



A-620

THE COURT: What is your position as to the inconsistency in the Grand Jury testimony?

MR. APPLEBY: Agent Ebert did testify that the statement that there was cocaine was made outside the house. I think at a later part of his testimony he says that the statement was made inside the house.

In any point, it's a minor inconsistency. Sgt. Rawald is the one speaking to the defendant, not Agent Ebert. Agent Ebert is testifying to hearsay, so it's inconsequential. And there is no dispute about the fact that Joseph Setter went to the back of his bedroom, went to the file cabinet, turned around and handed the Tom McCan shoe box to Officer Marrero. There is no dispute about that.

Mr. Klein in his statement said the agents searched the house and the fact is they didn't search the house. And your Honor found they didn't search the house and there was no proof of that.

MR. KLEIN: Let me point out something here. Mr. Appleby is doing the questioning at the Grand Jury and Mr. Appleby says, "Question:

A-621

The purpose in his going into the house was two-fold. One to attend to some personal affairs?

"ANSWER: Yes.

"QUESTION: And, two, to surrender the drugs he had in the house?

"ANSWER: Yes."

Mr. Appleby is the one who mentioned there was a twofold purpose before they went into the house.

MR. APPLEBY: That makes it triple hearsay.

Sgt. Rawald wasn't available, your Honor. I called Agent Ebert because the Sargeant wasn't available. And the one introducing those facts, I was incorrect about that. There is no big deal about that.

MR. KLEIN: I am arguing about a printed word here. You're making a statement you were incorrect about it.

MR. APPLEBY: I was wrong and Sgt. Rawald testified as to what happened.

THE COURT: Mr. Klein, as concerns your motion, the Court had a hearing on this particular issue. The Court made a decision and at that time Mr. Ebert was very specific as to the fact that it

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was inside the house that the matter was brought up. And it wasn't prior to going into the house. The Court has heard what was in the Grand Jury testimony. It's there. And dispite that fact your motion is denied at this time; motion denied.

MR. APPLEBY: Thank you for bringing out the fact of the hearing. I had forgotten about that, your Honor.

THE COURT: Do you want a short recess?

MR. KLEIN: I need five minutes.

THE COURT: We will take a five minute adjournment.

(A recess is taken.)

(The following takes place out of the presence of the jury.)

MR. KLEIN: Your Honor, I would like to recall Mr. Meltzer, for one more question. I just found out something I didn't know before.

THE COURT: You want to recall Mr. Meltzer?

MR. KLEIN: Yes, and that's it.

THE COURT: Bring in the jury.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

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B E R N A R D M E L T Z E R, previously sworn, resumes the stand and further testifies as follows:

THE COURT: Ladies and gentlemen, Mr. Meltzer has been recalled by Mr. Klein on behalf of the defense.

MR. KLEIN: Thank you.

FURTHER CROSS-EXAMINATION

BY MR. KLEIN:

Q Mr. Meltzer, who wrote the entry into the police book about the yellow Cadillac Eldorado?

A I did.

Q And are you color blind?

A Yes, I am.

Q Did you refer to that Cadillac in any other of the documents that you have here in court?

A Yes, I did.

Q And how did you refer to that Cadillac?

A The car is beige.

Q And is that how you referred to it?

A Yes.

Q And what paper did you refer to?

A The time and material report.

Q And that's in evidence here?

A Yes.

MR. KLEIN: That's all.

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lawyers, so I will say you may return at 2:30, 2:30.

I have some legal matters to go over with the lawyers. It will take a little time and that will give me sufficient time. And at 2:30 we will start the Government's summation.

So the jury will go to lunch.

Please do not discuss this case with anyone on or off the jury.

2:30. Thank you.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: I will take your motions at the end of the case at this time, Mr. Klein.

MR. KLEIN: Move to dismiss the indictment on the ground that the People have failed to prove--not the People, the Government has failed to prove beyond a reasonable doubt the guilt of the defendant, particularly as to count one and two. They failed to prove beyond a reasonable doubt that the defendant was in the house and that the defendant was the one who made the purported sale, the alleged sale to Rosenberg.

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I say that it's an inference upon an inference, and certainly if it's indirect testimony, it's not beyond a reasonable doubt and he failed to prove the guilt of the defendant, Mr. Setter, as to counts one and three.

On the first four counts I would state that the evidence of alibi creates a reasonable doubt and that the People have failed to prove their case against Mr. Setter on each of the first four counts.

THE COURT: I don't believe in connection with the defense that there is anything that the defense has brought forth as the entrapment. Is that correct?

MR. KLEIN: Yes.

THE COURT: Are you agreeing with me?

MR. KLEIN: Yes, sir, I am.

THE COURT: So entrapment is not a defense in this case?

MR. KLEIN: No, sir.

THE COURT: All right.

You may continue, Mr. Klein.

MR. KLEIN: That would have been the defense had Mr. Setter taken the stand and

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testified in his own behalf.

I am aware of the fact that the alibi defense upon which we relied only spans the first four counts and don't go to the fifth count.

The fifth count I am going to have to rely on the Appellate Court as to whether that was a lawful or unlawful search and seizure.

THE COURT: That's entirely up to you.

MR. KLEIN: Yes, that's correct.

And actually I am really going to the jury on alibi on the first four counts, but in connection with my motion I respectfully move to dismiss the first four counts of the indictment.

THE COURT: I will hear Mr. Appleby.

MR. APPLEBY: Your Honor, I feel it's a jury question with respect to all counts.

Now, I would like to bring out one matter, and that's with respect to the fifth count.

I have talked this matter over with Mr Klein and I think we have agreed that Mr. Klein cannot argue to the jury that's an illegal search because that would be in effect usurping your Honor's ruling with respect to the search.

MR. KLEIN: Can we hold that after I get a

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ruling from your Honor, and I would like to get guidelines from the Court as to how I approach the fifth count in summation?

THE COURT: I think the charge, the charge will tell them.

All right, we will conference that particular point together with going over the charge with the Court as to count five.

MR. KLEIN: Yes.

In other words, I want to know what I am permitted to say.

THE COURT: We will conference that issue.

MR. KLEIN: Yes.

MR. APPLEBY: One other matter I would like to bring up to your Honor.

Mr. Klein says he will not argue entrapment in summation.

THE COURT: He has put in no defense.

MR. APPLEBY: I know that, your Honor.

However, there were many questions Mr. Klein elicited on cross which tended towards the entrapment defense. I think the seed of the entrapment defense is definitely implanted in the jury's mind and I ask your Honor to charge the

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jury that entrapment is not a defense here and they should not consider the defense of entrapment.

THE COURT: We can also consider this in going over the charge with the attorneys.

MR. KLEIN: Actually, my recollection is that the main question was that Harvey Rosenberg tried to get Mr. Setter to meet with Mr. Rosenberg in a number of occasions and at first the answer was: no. And finally it was, Yes.

And it would seem to me that would go toward the second sale of Mr. Copeland.

Without Mr. Setter taking the stand and telling him of all the efforts that Harvey Rosenberg made, I don't see how I can stretch it to the fifth.

MR. APPLEBY: I understand that.

I am just saying that the jury is entitled to know that is not a defense in this case There is a possibility they may acquit on that basis.

THE COURT: They may have some idea on that, so the Court will have to clarify the position one way or the other.

MR. APPLEBY: Yes, to point out the defense is alibi and that there is no entrapment.

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THE COURT: Any other motions, Mr. Klein?

MR. KLEIN: Yes--I would say things--

THE COURT: As to counts one to four, the Court will permit the jury to deliberate. There are questions of fact which the jury should decide.

The motions are denied as to counts one to four.

MR. KLEIN: I think there is a Brady situation insofar as the Grand Jury minutes of H. Ebert is concerned.

THE COURT: That's count five?

MR. KLEIN: Yes, sir.

THE COURT: Well, the Court does not agree with you because in his stead on the hearing he was very clear and very direct and the Court did not find that to be so.

MR. APPLEBY: I know there was no compulsion on the Government's part to give me the Grand Jury minutes in advance because it doesn't apply to a hearing, except I think the Government should have properly pointed out to me the fact that in the Grnd Jury minutes there was inconsistent

testimony by Agent Ebert and I found that out later.

MR. APPLEBY: I didn't notice there was an inconsistency. It was a minor inconsistency anyway.

THE COURT: It could have been Brady material and something Mr. Klein could have been entitled to.

MR. APPLEBY: I don't think this inconsistent statement amounts to Brady material.

THE COURT: It's a little difficult to say. It might possibly be construed in that fashion.

Do you have a motion as to count five?

MR. KLEIN: That would be the motion on count five, your Honor.

And I, of course, renew my motion to suppress on that count and I feel because the Government didn't furnish me with Brady material, they didn't tell me either prior to trial as part of discovery proceedings or even while Agent Ebert was on the stand, the fact that he had testified entirely contradictory to his testimony in court at the hearing and contradictory to Sgt. Rawald's testimony, and the fact that the

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prosecutor had even asked the question at the Grand Jury in that particular fashion, that evidence should have been furnished to me as being exculpatory and certainly bearing on the issue whether or not we had a lawful search and seizure and unlawful search and seizure. Because it makes all the difference in the world in my opinion if we believe Agent Ebert's testimony in the Grand Jury. And I think I should have been apprised of it.

MR. APPLEBY: Mr. Klein brought it out before the jury. I think Mr. Klein made the most he possibly could have on that inconsistency. I think you had a lot of mileage on it.

MR. KLEIN: If I had it at the hearing I could have cross-examined Agent Ebert and perhaps the Judge would have ruled differently.

Look at my position. I am letting the four counts go to the jury and the fifth count is going to the Appellate Courts. That's the defense. It's like a possession count and you make a motion to suppress and the Judge denies the motion to suppress, like a possession of the gun and actually the appeals court is the trial

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court. They are in the trial court on that and you know the higher courts, there is not that much success there. Here the Judge sees people and in Foley Square they see numbers of cases, and that's all. My day in court is today in Judge Bramwell's courtroom and not in the Court of Appeals.

THE COURT: Mr. Klein, your motion to dismiss on count five is denied.

I will go over the charge now.

(The following takes place in camera.)

THE COURT: Okay.

On the charge, the Government's request to charge, number one is granted.

I am going to put a title on that as being equally unavailable to both sides as to that particular one. In fact, the title--hold it.

Absence of informant, Harvey Rosenberg, equally unavailable to both sides. And right after that I have from the pattern jury, 11.33, absence of a witness, and it's absence of a witness equally available to both sides.

Now, number two is denied.

MR. KLEIN: I have no objection--I am not

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raising objection, but in summation do you want us to discuss that particular portion now?

THE COURT: What is that? You can discuss it consistent with this.

MR. KLEIN: Consistent with this?

THE COURT: Sure.

MR. KLEIN: Suppose I say to the jury you can't draw an inference unfavorable because either side didn't call him. The Judge will tell you that. After all, remember Harvey Rosenberg is part of the Government case. He is the one who is supposed to make the buy and introduced the defendant. Where is he?

THE COURT: You can't say that, you can't say that.

You can say anything which is consistent with this.

Okay. Number two is denied as inapplicable. It's entrapment.

Number three is granted.

Okay.

Now I have to go to Mr. Klein's request.

Now, they were handled under the different issues which are--you know, you have got them in

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quite a mass, so I have to handle them as issues.

Now, as to factual evidence, it's incorporated in the Court's charge in a modified form.

As to credibility of witnesses, that's incorporated in the Court's charge in a modified form.

As to informant--

MR. KLEIN: He didn't testify.

MR. APPLEBY: Inapplicable.

THE COURT: I didn't say that it's inapplicable because the informant did not testify and his testimony at the preliminary hearing on the motion to quash was not admitted by the Court.

That's denied.

Minority opinion, incorporated in the Court's charge.

Alibi, incorporated in the Court's charge.

MR. KLEIN: Excuse me, it's true the informant didn't testify, but the activities of the informant should be scutinized. He had a stake in it at the beginning. It's part of his bargaining. He had to gain.

THE COURT: What you say he had to gain?

MR. KLEIN: A light sentence.

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THE COURT: Well--

MR. KLEIN: Rosenberg got probation, didn't he?

MR. APPLEBY: When you argue that, wouldn't that be on the issue of entrapment?

MR. KLEIN: No, on the issue of credibility.

MR. APPLEBY: If it's on the issue of credibility, he hasn't testified.

MR. KLEIN: The point is this: Mr. Copeland says that Rosenberg came in the house. He said Rosenberg told me he just bought it from Setter. Setter sold it to him. He could have told him anything.

MR. APPLEBY: There was no hearsay statements allowed by the Court. I will argue on the circumstantial evidence it was Setter who sold the cocaine. I will not base my argument on anything Harvey Rosenberg told Det. Copeland. That's hearsay.

MR. KLEIN: Anything Harvey Rosenberg did or said, although he didn't testify on the stand, is suspect because this fellow was trying to bargain for leniency in his own case.

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THE COURT: You want to so state?

MR. KLEIN: Something like that.

THE COURT: I will permit you to so state, to state that.

MR. KLEIN: Yes.

THE COURT: Alibi--

MR. KLEIN: What about the minority?

THE COURT: Minority opinion is incorporated in the Court's charge in a modified form.

Alibi is incorporated in the Court's charge in a modified form as applicable to counts one, two, three, four, and not applicable to count five.

Pages, transcripts, incorporated in the Court's charge in a modified form and expanded form.

Overruling Government's participation, denied as inapplicable.

THE LAW CLERK: Overreaching.

THE COURT: Overreaching, I'm sorry, overreaching Government's participation, denied as inapplicable under evidence as an erroneous statement of law.

Entrapment denied as inapplicable.

Indictment incorporated in the Court's charge

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in a modified form. I will read the indictment. And not only do I read it, it's my practice to give a copy of the indictment to the jury to use during their deliberations.

Equality, incorporated in the Court's charge in a modified form.

Presumption of innocence incorporated in the Court's charge in a modified form.

Hypothosis of innocence incorporated in the Court's charge in a modified form.

Burden of proof incorporated in the Court's charge in a modified form.

Reasonable doubt, incorporated in the Court's charge in a modified form.

Legal rulings incorporated in the Court's charge in a modified form.

Factual determination incorporated in the Court's charge in a modified form.

Evidence, A, incorporated in the Court's charge in a modified form. B, denied as inapplicable, C, denied as inapplicable. D, denied as inapplicable.

Act of omission and intent, denied as

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inapplicable.

That's the defendant's requests.

MR. KLEIN: Now what do we do on number five, your Honor? Alibi goes on one through four. On five I would like to make some statement here that there is a legal--there has been a legal situation where the Court has ruled that the search was--that it was a proper seizure.

Well, you didn't rule it was a seizure, you ruled it was handed over voluntarily and therefore we can't argue that.

THE COURT: It wasn't a seizure. It was a consent; it was a surrender.

MR. KLEIN: How can I refer to five at all or to the fact that it was a matter of law which I am precluded from arguing at this time to the jury?

THE COURT: Mr. Appleby, would you like to say something?

MR. APPLEBY: First of all, I don't think Mr. Klein can say anything about count five. Your Honor has ruled it was a legal consentual surrender of the narcotics. That was your ruling. And for Mr. Klein to now argue to the jury it was

involuntary or something illegal about it, it would be flouting your Honor's ruling. I don't think Mr. Klein has the leeway to argue anything for count five. I think he has to argue that to the Court of Appeals. I think he is precluded from making any argument to count five.

THE COURT: Mr. Klein.

MR. KLEIN: I understand that when your Honor makes a ruling of law, I can't go to the jury and have them find on the facts different than your Honor has on the law if it was a legal question. I am just wondering, suppose the jury--it's not up to the jury.

I am thinking out loud.

Suppose the jury found it was an unlawful seizure, they can't decide it because that issue is not before them. Is that right?

THE COURT: That issue is not before them.

MR. KLEIN: The jury will wonder why I am silent on number five and the only thing going before the jury is that character witness alone can create a reasonable doubt. But that isn't enough to take him out on it. I would like to say something without disturbing the fact that

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your Honor made the ruling on the law.

THE COURT: I don't know what you can say other than--

MR. APPLEBY: I know Mr. Klein can say or would like to say something, but I think he is in a situation where he can't. You can't argue on the law. What facts do you have to make an argument? You have no evidence on it other than what was put in by the Government.

MR. KLEIN: They found the merchandise there. No question about it. The only point is that one officer said while he was being arrested--but that's leading into the question of law on search and seizure.

THE COURT: As I see it, you're bound by the Court's ruling and I don't see any way that you can argue the legality of the search at this time.

I am not saying it was a search.

MR. KLEIN: I know what you mean.

THE COURT: The legality of the action of the agents. Because the Court's ruling is that it was not a search and Mr. Setter consented and made a voluntary turnover of the drugs under count

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five.

MR. KLEIN: That would be the point of our appeal, that it wasn't a voluntary turnover, that it was a seizure.

THE COURT: I could appreciate that, but as to the Court's position, you have to accept the Court's position.

MR. KLEIN: Yes, I know.

I don't know what to tell the jury. They don't understand if I am silent on it--of course, I expect to argue that in front of the Court of Appeals. And the jury doesn't know that and I can't tell them that. There is no question about that. And they will just hear a defense as to four counts.

THE COURT: It would appear that way.

MR. KLEIN: I am wondering if there is some innocuous statement that can be given to them, because, frankly, what I am concerned about is spillover. This jury is acquainted with the fact that there was a seizure or a surrender of a quantity of cocaine on July 3rd and that can contaminate the whole case and they will not listen to the evidence in the rest of the case;

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this fellow had it and he must have been dealing with it, all right, next case.

THE COURT: I don't know how the jury will consider this. But with the Court's ruling on count number five, you must confine yourself within the limits of what the Court has ruled and your arguments can only be consistent with the position of the Court.

MR. KLEIN: I put it to the client that you are going with the four counts and you have to be convicted with the fifth in this court.

Do you want me to resume the negotiations with Mr. Setter about taking a plea?

THE COURT: I'm not interested in what the negotiations were or whether you had them or didn't have them. I am not interested in the negotiations or whether you had them or not.

MR. APPLEBY: May I make a statement, your Honor?

This seed of entrapment has been definitely planted in the case. There is no question about it. And I think the jury should get some guidance on the fact that entrapment is not a defense and they should not consider

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the question of entrapmen And that's all I request.

THE COURT: Mr. Klein.

MR. KLEIN: I don't think there should be anything said for or against. If it's stricken out, the defense is alibied.

MR. APPLEBY: The jury doesn't know it was stricken out.

MR. KLEIN: I haven't told them. I haven't used the word "entrapment."

THE COURT: My position is I would rather avoid saying anything.

In that matter, if the jury should come in on a question of entrapment, I would say then that this issue is not before you; it's not for you to consider. But I will wait until they come in rather than take a hard and fast position now and maybe there will be certain areas of it the jury may want to consider. That's the approach I will take. If the jury comes in with a question on entrapment, it is not before them because there is nothing in the case which they can use as a--well, they can use it as a base, but the issue of entrapment is not before them.

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MR. APPLEBY: Your Honor, sometimes jurors are irrational and dispite the fact that no instructions have been given to them, they say, "Well, this guy Setter was approached by an informant working for the Government, it's not right, I don't like it and I'll acquit."

THE COURT: They are instructed to that, whether or not they like the accomplice that--

MR. APPLEBY: I am talking now about the use of Government informants to penetrate narcotics dealers.

THE COURT: I believe I have something there on that.

THE LAW CLERK: What you have is a specific charge about a man being tapped.

MR. APPLEBY: I am talking about specifically, your Honor, sometimes the jury is turned off by the fact that the Government uses informants to penetrate narcotics dealers and not the Government agent acts as a buyer and they are turned off by it and they say, "We don't like it and we are going to acquit."

And I think the jury is entitled to know that's not their function.

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THE LAW CLERK: Did you request particularly on the use of an informant?

MR. APPLEBY: It was incorporated in my request number two, which is entrapment. And I think now it has to be modified.

THE COURT: Let me look at it.

MR. APPLEBY: Okay.

Your Honor, can I direct your attention to the fourth paragraph of my request number two?

THE COURT: Fourth paragraph on the first page?

MR. APPLEBY: Yes. There is language in there that says that the mere fact that--strike that out.

There are circumstances when--

THE COURT: Just that paragraph?

MR. APPLEBY: Yes, your Honor.

And then it goes on to the next page.

MR. KLEIN: I don't think it's apropos here, your Honor. There is no defense. If there was a defense coming in of entrapment, I can understand it. And what happens, it's weighted to one side and then there is nothing on the other.

I think that's telling them to convict.

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That's not rig . I didn't put in a defense.

MR. APPLEBY: I am concerned, only, your Honor, that the jury understands or that they like the policy of agents assuming--

THE COURT: We have a pattern as to the agents.

THE LAW CLERK: I don't know if we have a pattern, but we can say something to the effect on occasion informants--the Government uses informants to generate cases whether you like this or not.

MR. KLEIN: The act and conduct of an informant should be scrutinized carefully because he has a stake in the outcome of the case.

THE COURT: We have used this before.

THE LAW CLERK: I will try to come up with that.

THE COURT: Yes, we have used it before.

THE LAW CLERK: I will come up with it.

MR. KLEIN: On number five, couldn't we say something to the jury, maybe your Honor can say it, as to number five, nothing was said by the defense and that this is not a matter for the jury? I don't even know the words, but can we know or let

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the jury know it's something separate and apart?

MR. APPLEBY: This is a criminal trial.

MR. KLEIN: I have a burden. I am defending somebody accused of a crime and it's not the first case I have. But I have another problem coming up: Suppose he took the position he is going alibi and he is not going to take the stand and put in the entrapment by Harvey Rosenberg; suppose there is a conviction and we get another attorney and a twenty-two fifty-five motion in stating I was derelict in my duties and I should have permitted him to take the stand and put in the defense of entrapment. And I am concerned with protecting my lisence that I have and I am worrying about that.

THE COURT: So your position is what?

MR. KLEIN: I don't know. It's a bad position to be in.

MR. APPLEBY: If you're concerned about twenty-two fifty-five, just say that the Judge told you you can't argue to the jury. It's as simple as that.

THE COURT: He is talking on the issue of the defendant taking the stand.

MR. APPLEBY: I thought he was talking about

the fifth count again.

MR. KLEIN: I didn't mean to mislead you, Mr. Appleby. I went from that into this.

I don't know what to say here. I must have advised him, but you know what happens every-time there is a twenty-two fifty-five, it comes back slanted the other way, that the lawyer, they didn't have effective assistance of counsel and he should have advised him.

I let him make his decision on this thing.

THE COURT: Is this his decision?

MR. KLEIN: It's his decision after I explained all the whys and wherefores and contingencies. In other words, if he rests now the alibi only goes to the first four counts.

THE COURT: The only thing I can tell you, if you want to put anything on the record that he says, it's up to you, if, when we resume.

MR. KLEIN: In the absence of the jury?

THE COURT: Yes. I will let you put anything on the record. I am not telling you you should do it or you should not do it. I am just saying I am making the record available to you for that purpose.

MR. KLEIN: I would appreciate that, your

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Honor.

THE COURT: That's up to you.

THE COURT: The suggestion here from the clerk is that we sever and he pleads guilty to count five and then the jury deliberate on one, two, three and four.

MR. KLEIN: That's not good because then he loses his appeal to five.

THE COURT: No, you can reserve your rights to appeal, sure.

MR. APPLEBY: You can do that, yes.

THE COURT: You reserve your right to appeal.

MR. KLEIN: Even on a plea of guilty?

MR. APPLEBY: Of course. You could have done this at the beginning of the case, even on a plea of guilty. You can reserve your rights to appeal as to the legal issue, which may--and that way you won't have five in the case, you will have one, two, three and four.

MR. APPLEBY: There is one problem there.

THE COURT: Yes, the Government would have to consent to this. That's the problem.

MR. APPLEBY: You mean about pleading guilty

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to count five and going ahead? But what would the jury think?

THE COURT: I am--I will ask them to draw no inference as to that.

MR. APPLEBY: Mr. Klein raised the possibility of a legal search and read inconsistent Grand Jury testimony and all of a sudden count five is dismissed and they think maybe the Government didn't do something wrong?

THE COURT: Yes, you can consider that part of it, Mr. Klein, and see what you would like to do about that. That's a possibility. And because you would have to plead guilty to count five and you would reserve your rights to appeal on the legal issue.

MR. KLEIN: The jury doesn't know that I pleaded guilty to count five?

THE COURT: No.

MR. APPLEBY: At the top of my head, your Honor, it sounds acceptable to the Government as long as the Judge charges quite specifically that they are not to hold--

THE COURT: No, no inferences or presumptions to count five, if we do that.

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MR. KLEIN: And the reason I couldn't have done it earlier is because we didn't know which defense we were going to use and he didn't make up his mind until this moment.

MR. APPLEBY: You talk to him about it. You preserve your right and you have the same rights of appeal as if the jury found him guilty on that count, and you are appealing it.

MR. KLEIN: Let me talk about it, your Honor. But I think that would be acceptable.

THE COURT: You have to check with your office on that, too, Mr. Appleby?

MR. KLEIN: You will not ask him to be remanded, will you?

MR. APPLEBY: I will consider that. I told you that.

THE COURT: All right.

As far as the charge goes, this is the introduction and it's boiler plate and I will read this:

No statement, ruling, remark or comment which I made during the course of the trial was intended to indicate my opinion as to why you should

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decide the case or to influence you in any way in your determination of the facts. If at any time I made any comment regarding the facts, you are at liberty to disregard it.

And it goes on in that fashion.

You are to draw no inference against the side against whom an admonition of the Court may have been addressed during the trial of this case.

This is a pattern jury charge, 10.11, objections and rulings.

It is the duty of the attorney on each side of the case to object when the other sides offers testimony or other evidence which the attorney believes is not properly admissible.

You should not show prejudice against an attorney or his client because an attorney has made objections.

It goes on.

The determining of facts, the jury is reminded before each member was accepted and sworn to act as a juror, he or she was asked questions regarding his or her competence, qualifications, fairness and freedom from prejudice or sympathy. Therefore, those answers are as binding on each of

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the jurors now as they were then and should remain so until the jury is discharged from consideration of this case.

You cannot decide that you do not like the sections of the law that I will quote to you or any other part of the charge. You have the obligation of accepting the law as I charge it.

There is an indictment here--I will read the indictment, each count.

MR. KLEIN: If we are going to do that, we will have to cut off five.

THE COURT: I will do it for you. You do what you want to do and I will see that it fits in with what you want.

MR. KLEIN: Right.

THE COURT: General introductory remarks regarding the statute involved in this case and individual counts of this indictment is based on two separate provisions of the particular same statute, Title 21, United States Code, Section 841.

And while I explain each of the counts to you, I will reread the statute and the relevant portions of the offense therein. I do this in order to facilitate your understanding of the

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applicable law controlling the individual count. I do this to emphasize it, although the counts in the indictment may be in certain--may in certain instances be based on the very same questions of the very same statute, each count charges a separate offense occurring at a separate time. Therefore, each count should be carefully, seriously and separately and individually considered by you.

And it goes on.

Ladies and gentlemen, you will note the indictment charged in each count charges the crime was committed on a certain date. And as to count five, the proof--I will strike that.

MR. KLEIN: In connection with that you are running into alibi on or about?

THE COURT: Please listen to it and then tell me what the exception is.

Count five, the proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on the date reasonably near the date alleged.

However, with respect to counts one, two, three and four, a different rule controls. As to these counts it is necessary that proof established with certainty the exact date of the alleged offense.

Therefore, the evidence in the case as to counts one, two, three and four must establish beyond a reasonable doubt that the offense was committed on the exact date alleged in the relevant count of the indictment.

Alibi evidence. The reason for the different treatment of counts one, two, three and four than that accorded to count five is because on counts, one, two, three and four evidence has been introduced pending to establish an alibi which amounts to a contention that the defendant was not present at the time when, or at the place where he is alleged to have committed the offense as charged in counts one, two, three and four of the indictment.

If after consideration of all the evidence in the case you have a reasonable doubt as to whether the defendant was present at the time and place the alleged offense was committed, you must

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acquit him on counts one, two, three and four.

You must remember it is part of the Government's burden of proof to establish the defendant's presence at the scene of the alleged offense. The defendant does not have the burden of establishing his alibi. The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses.

The alibi charged is from Devitt and Black, and it's 11.31, and cases set forth in the notes in 1975, pocket part; United States v. Booz, 45 Fed. 2d 719, 721 and 723, 3d Circuit, 1971.

Count one of the indictment is based on Title 21 of the United States Code, Section 841 (a) (1) which provides in pertinent part that it shall be unlawful for any person knowingly or untentionally to possess with intent to distribute a controlled substance.

You are instructed as a matter of law that cocaine is a schedule two narcotic drug controlled substance.

Essential elements of the offense as to count one: First, if the defendant Joseph Setter

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possessed cocaine on or about--on--not on or about--on the 17th day of April, 1975, within the Eastern District of New York; and, second, that the defendant, Joseph Setter, did so possess with the specific intent to distribute cocaine, a schedule two narcotic substance; and, third, that the defendant Joseph Setter did so knowingly and intentionally.

Now, all of these counts are going to be the same, so it's no use in rereading it.

MR. KLEIN: You're taking out, "about"?

THE COURT: It's "on" it's not "on or about," it's "on."

They are all the same, just that I have to repeat them and I have to go through them.

And then count five is here. If I use it, I will use it. If I don't use it, I will not use it.

MR. APPLEBY: With respect to count five, may I interject something?

If the defendant decides to plead guilty, it's fine with me. But I will be still entitled to argue that the fact that the cocaine was seized, and ask the jury to infer based on the seizure, that

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he engaged in these transactions. It will be just as if the Government hadn't indicted him for the seizure and then we argue to the jury that a certain amount of cocaine was seized from him and ask them to infer that he dealed with cocaine on the basis of that.

THE COURT: I will probably have to give the Government that right.

MR. KLEIN: It's not a prior similar act or something.

MR. APPLEBY: It's a seizure.

MR. KLEIN: You see, the spillover on that will contaminate the other four counts.

THE COURT: We will look at it and consider it and I will tell you. We will look at it and consider that.

MR. APPLEBY: I may point out, your Honor, the Government very often seizes evidence at the time of the arrest of the defendants and introduced that at the time of the trial. And, for instance, even if they were not indicted for that, for instance money--

MR. KLEIN: If you do that and there is a conviction across the board and I win the appeal,

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then I have a mistrial on the other four counts. It spilled over. It was used as evidence on the other four.

MR. APPLEBY: That would be the risk I would take then.

MR. KLEIN: There is no inducement for me to plead to the fifth count and do that. There is no inducement. You will use the evidence and you got a deal, a guilty plea.

MR. APPLEBY: I want to talk this over with my superiors. I think it's right that I argue it.

THE COURT: You talk it over and I am not sure what the Court will do. The Court will consider it and we will let you know what we will do and the Government has an important point.

Now, on count five, the only real difference is on or about in count five, if I use it.

MR. KLEIN: I have no alibi there.

THE COURT: Right.

Cocaine is a controlled substance. You have previously been instructed as a matter of law that cocaine is a controlled substance. Now, it's up to you, the jury, and you alone, to ascertain whether or not the material in question in each of the

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counts presented to you was in fact cocaine.

In so doing you may consider all the evidence in the case which may aid the determination of that issue, including the testimony of any expert or other witness who may testify either to support or to dispute the allegation that the material in question was cocaine.

I might also state it is my practice to send all of the exhibits into the jury to use during their deliberations.

MR. KLEIN: You don't send in the transcript, it's not an exhibit.

THE COURT: No, the transcript is not an exhibit. It cannot go in. They will have to call for a rehearing of the tapes.

MR. APPLEBY: But it is in the evidence.

THE COURT: Yes, but they will have to call for a rehearing as to the transcripts. See that that doesn't go in.

MR. KLEIN: But the next time they do it, they don't have the transcripts in front of them.

THE COURT: Right.

Actual amount of cocaine need not be proved. That charge is given to them.



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The defendant did everything he could to cloud

on July 3rd, 1975.



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Definition of distribute, definition of possession, knowingly; definition of willfully, to act; definition of specific intent applicable to all offenses charged in the indictment.

MR. KLEIN: You forgot to mention character evidence before. You should have something on character evidence.

THE COURT: Proof of knowledge and intent; credibility of witnesses, 12.15 of the Patterns. All available evidence need not be produced. The law does not require the prosecution to call his witnesses, all persons who may have been present at any time of the case or who may appear to have some knowlege of the matters at issue in this trial. Nor does the law require the prosecution to produce as exhibits all papers and thing mentioned in the evidence.

However, in judging credibility of witnesses who have testified in considering the weight and effect of all evidence that has been produced, the jury may consider the prosecution's failure to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence

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and available.

Absence of informant Harvey Rosenberg, equally unavailable to both sides. This is Government's request number one.

And after that is 11.33, absence of witness equally available to both sides.

And then tape recordings of conversations allegedly taken place between the defendant and third parties--

MR. APPLEBY: Your Honor, with respect to the witnesses equally available, who does that apply to? I think it might be inapplicable in this case.

THE COURT: It is inapplicable, it is inapplicable.

Thank you.

I really felt it might be necessary, but it's not.

THE CLERK: Because you have had the stipulation of the agent this morning.

MR. KLEIN: Right.

THE COURT: Now, it's obvious that an important question for you to determine in your careful consideration of this case is whether or not Joseph

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Setter is in fact one of the parties to the tape recordings of conversations which allegedly took place between the defendant and third parties.

Now let me emphasize this to you, because it is of crucial importance: The Court has admitted these tape recordings into evidence for your careful consideration and yours alone. The Court has absolutely no feelings one way or another and has made no judgment as to whether or not Mr. Setter is in fact one of the parties to the taped conversation. The Court has merely found as a matter of law that you should be able to consider these tapes both as to what was said and as to who the parties were to these conversations.

I cannot emphasize strongly enough to you that by admitting these tapes into evidence I have not formulated an opinion as to the participant's identities or as to the substance and import of the conversations. These are questions for you alone to decide.

And in this regard let me say this to you: The transcripts which you read along with the rendition of the tapes are not evidence, but were merely devised to facilitate your listening. It

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is only what you have heard and understood which is evidence.

This is very important, so I will repeat this now: It is the tape recordings which are evidence and not the transcripts. These transcripts were given to you only in the order that they might assist you in understanding a tape recording, the tape recordings. And, therefore, I direct you to rely only on what you actually heard from the tape recordings.

If there is a conflict with the tape recording and transcript or of the two don't conform, then you must disregard the transcript.

Furthermore, let me say this to you: If you desire after you retire for your deliberations, you may have these tape recordings replayed. Just knock on the door and hand a note to the United States Marshal, et cetera, et cetera.

Request number three is next.

Defendant takes the stand is out.

I am going to put in there a charge on the failure of the defendant to take the stand.

MR. KLEIN: What would that be?

THE CLERK: I will read it to you.

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THE COURT: It's right out of the Patterns.

MR. KLEIN: I was wondering if I was better off--

THE COURT: It's up to you. I am not telling you what to do.

MR. KLEIN: All right.

THE COURT: Effect of prior inconsistent statement or conduct by a party not a witness--this is 12.13 of the Patterns.

11.30, character evidence, reputation of the defendant. I will give the Pattern just as it is.

MR. KLEIN: All right.

THE COURT: 11.27, opinion evidence, expert witness.

12.05, impeachment, inconsistent statements or conduct.

Testimony of federal officials. The believability of every witness is for the jury. The fact that such a witness has come before you as a Government agent should not in the least change your attitude in this respect. Their testimony does not deserve either greater or lesser believable

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credibility simply because of their official status. Whether you do or do not believe any witness must depend on how truthful you judge that witness to be after you heard the testimony and formed your own conclusion as to the witness' believability.

Judging the evidence.

Jury's recollection controls.

Punishment is for the Court.

It excludes sympathy and antipathy.

Unanimous verdict, and then verdict.

MR. KLEIN: I have one additional request, and that is that I respectfully request your Honor to charge the jury that if they feel that Setter possessed or sold narcotics to either Copeland or Rosenberg, but not on those days, at some other time; they must acquit because of confrontation. The man is entitled to be apprised of the specific nature of the charges against him.

THE COURT: That's consistent with the alibi position.

MR. KLEIN: Would your Honor so charge?

MR. APPLEBY: I think it's incorporated within your Honor's charge.

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THE COURT: I think it is, too.

THE CLERK: It's stated in the positive form.

THE COURT: The alibi specifically instructs the jury. I will leave the charge just as it is.

MR. KLEIN: All right.

I can argue it.

The only observation I make now, when you said you can come back to have the tapes replayed, you're singling out the tapes.

THE COURT: It's up to the jury.

MR. KLEIN: Couldn't you tell them that they can have any exhibit sent into them?

THE COURT: They would have to come in the courtroom to hear the tapes. There is no other way it can be done.

MR. KLEIN: Yes.

THE COURT: All right?

MR. KLEIN: Yes.

THE COURT: That's the charge.

MR. KLEIN: Okay.

THE COURT: And it's 1:25 now. I said 2:30. So that gives you your lunchtime.

Come back and you will decide about count

A-666

five and what you want to do. Talk to him outside.

MR.KLEIN: It depends also on whether you will permit him to use the facts on count five as probable evidence that he committed one, two, three and four.

THE COURT: You consider it and the Court will look into it and before we will start we will go into it.

All right, Mr. Appleby?

MR. APPLEBY: Yes, your Honor.

THE COURT: Thank you.

(Luncheon recess.)

AFTERNOON SESSION

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(The following takes place out of the presence of the jury.)

THE COURT: First I will take Mr. Klein. What do you wish to do?

MR. KLEIN: I have no choice, but to go ahead.

THE COURT: You are going to put him on the stand?

MR. KLEIN: No, I will stay right now.

THE COURT: Or do you want him to say he will not go in or aren't you interested in that, or do you want him to say he will not go on the stand?

MR. KLEIN: Say what?

THE COURT: Your client.

MR. KLEIN: May I put something on the record, if your Honor please?

THE COURT: Yes. Go right ahead. It's up to you.

MR. KLEIN: Your Honor, I have acted as counsel for Mr. Setter and tried to advise him to the best of my ability. And two possible defenses were suggested in this case, one of alibi which only spans the first four counts; and the

other of a possible defense of entrapment, which if strong enough would span the five counts.

In order to establish entrapment Mr. Setter will have to take the stand. If he took the stand--

THE COURT: You don't have to explain it to me. All I am asking you, is he saying he is taking the stand or not taking the stand.

MR. KLEIN: Have you decided where you want to go?

THE COURT: Speak louder and repeat it so the reporter can get it.

MR. KLEIN: You have to make a decision whether you want to take the stand and go ahead with the entrapment defense or not take the stand and stand on your alibi defense which only goes to the four counts.

THE COURT: This is only for the record and has nothing to do with your defense and this is something the jury knows nothing about. You are not required to take the stand and you can stand on your rights. You have a constitutional right to say nothing and in that event I will give a charge to the jury to the effect that this is

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your right and they are to draw no inferences or presumptions by virtue of the fact that you do not take the stand.

But if you wish to take it, that's up to you. And if you don't wish to take it, that's your business, and you are not required to take the stand.

Do you understand that?

MR. KLEIN: In other words, you would then--on the fifth count you would depend solely--

THE COURT: It has nothing to do with nothing. Does he want to take the stand?

MR. KLEIN: Do you want to take the stand or not?

THE DEFENDANT: No, sir.

MR. KLEIN: What?

THE DEFENDANT: No, sir.

THE COURT: You understand what the Court has told you?

THE DEFENDANT: Yes, sir.

THE COURT: Thank you.

I want to put it on the record.

Thank you.

What else do we have?

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MR. KLEIN: Nothing else, your Honor.

THE COURT: What are we going to do with count five if you are going to do anything?

MR. KLEIN: I would respectfully move to sever and ask the prosecution be not permitted to allude to the facts of count five.

THE COURT: You mean sever and plead guilty to that count?

MR. KLEIN: Yes, and preserve my rights.

THE COURT: Reserve your rights of appeal as to the legal issues in count five?

MR. KLEIN: That's right.

THE COURT: The Court will permit you to do that, but I will hear what Mr. Appleby has to say.

MR. APPLEBY: First of all, the fact that he pled guilty is even a stronger reason for us to argue that the surrender of the cocaine is evidence of the narcotics dealing. In other words, the fact that he pled guilty is a stronger reason we can argue on summation. And we will not consent to that procedure. We will strongly oppose it; and I have talked to my superiors on that.

THE COURT: They are not consenting to that.

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Nothing we can do.

MR. KLEIN: I know.

THE COURT: Ready to proceed on summations?

MR. KLEIN: Yes, your Honor.

THE COURT: All right.

Bring in the jury.

(The jury enters the courtroom and the following takes place in open court and in the presence of the jury.)

THE COURT: All right.

Ladies and gentlemen, at this time we are going to have closing arguments and the Government will make the first closing argument to you.

You may proceed, Mr. Appleby.

(Mr. Appleby makes a closing statement to the jury on behalf of the United States of America as follows:)

MR. APPLEBY: Mr. Klein, your Honor Judge Bramwell, Madam Forelady and ladies and gentlemen of the jury:

This case has been an exceedingly simple case, and I might add, and I don't use this word lightly, an overwhelming case, because it was so simple and because it was so overwhelming.

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The defendant did everything he could to cloud the issues in this case, to raise smoke screens, to divert your attention from the real issues in this case.

The real issues in this case are whether the defendant sold to Harvey Rosenberg on April 17th, 1975, approximately an eighth of a kilogram of cocaine.

The second issue is whether in fact he sold on April 28th, 1975, another eighth of a kilogram of cocaine to Det. Copeland, an undercover agent.

And finally, ladies and gentlemen, the issue is whether a quantity of cocaine was seized from the residence of the defendant on July 3rd, 1975.

I would submit to you that the Government has not only proven the defendant guilty beyond a reasonable doubt in this case, but beyond all possible doubt. And try as they might, and they try very hard, there was no getting around the fact that the defendant sold directly to a federal agent a large quantity of cocaine; a large quantity of cocaine was seized and he was caught red-handed

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on July 3rd, 1975.

Now, since we have had a three day interval, holiday period, and since the case has lasted beyond a week, I would like to outline and go over the facts very briefly with you in chronological order.

The evidence in the case did not come in chronologically, so I think it's a good opportunity to go over the events of this case in sequence.

Now, we started out with the arrest of Harvey Rosenberg. Harvey Rosenberg was arrested for dealing with cocaine. He was looking for leniency with the Government. Because he was looking for leniency with the Government he decided to help the agents in locating dealers in cocaine. He didn't do it because he was a public spirited citizen trying to rid the world of narcotics dealers. He did it for his own benefit.

Now, incidentally, with respect to Harvey Rosenberg, as is obvious, Harvey Rosenberg has not testified in this case. You are to draw no inference one way or another as to why Harvey Rosenberg was not called as a witness in this case. He was unavailable. Judge Bramwell will charge

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you with respect to Harvey Rosenberg's testimony and his unavailability. And I will ask you to listen very carefully as to that point.

But the bottom line as to Harvey Rosenberg is that you are to draw no inference against the defendant and you are to draw no inference that he was to give testimony contrary to that which the agents gave, and you are to draw no inference against the defendant.

In any event, Harvey Rosenberg informed the agents of the dealings of Mr. Setter in narcotics. The investigation began full blown on April 10th, 1975. And at that time you will recall Harvey Rosenberg placed an undercover telephone call to Mr. Setter at his place of business at Exclusive Motors.

Now, these undercover telephone calls, ladies and gentlemen, which are monitored by the agents, are an accepted law enforcement technique. And Judge Bramwell will charge you with respect to that. There is nothing illegal about them. It's a common practice that law enforcement officers will use.

And the purpose of that call, if you remember, is to arrange a purchase of cocaine.

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Ideally, Mr. Rosenberg would have liked on that occasion to introduce the undercover detective who we now know to be Det. Copeland to Mr. Setter. That was the purpose of the telephone call. Of course, we realize that Mr. Setter is at first balked and it was necessary for Mr. Setter to sell directly to Mr. Rosenberg on the first occasion.

Now, there has been a question raised in this case as to the identity--of Mr. Setter's--as to Mr. Setter's identity on this telephone call. The question before you, is this Joseph Setter who was on this telephone call with Harvey Rosenberg or was it not Joseph Setter.

I suggest to you right at the outset of this first telephone conversation, that issue is put completely to rest. First of all, Harvey Rosenberg is calling 773-0268. That's the number, you will remember, of Exclusive Motors.

Remember, I showed Mr. Meltzer this business card which Mr. Setter had given to Det. Copeland later on and I asked him about 773-0268, and he said that's the number of Exclusive Motors.

That's the number that Harvey Rosenberg calls on the first telephone call. That is also

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the business place of Mr. Setter.

And then Rosenberg calls up, he asks--he says, "Exclusive Motors--excuse me, an unknown male says, Exclusive Motors.

And Harvey Rosenberg says, Joe Setter, please.

There is a pause of about two minutes and twenty-five seconds and then Joe Setter gets on the line. He says, hello.

Harvey Rosenberg says, Joe Setter.

And Joe Setter says, yeah.

So who is answering the phone there? Joseph Setter. There are not two people at Exclusive Motors with the name Joe Setter.

There are five employees there. Obviously it's Joseph Setter who is getting on this telephone call.

Incidentally, ladies and gentlemen, there is an interesting sideline to this first part of the conversation. Harvey Rosenberg says, "Yeah, you stiff. You went to Puerto Rico. Nice, right."

And Joseph Setter says, "Yeah," and he talked about his tan, et cetera.

Do you recall the testimony of Bernard

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Meltzer when he was trying to give an alibi for Joseph Setter on April 17th? He told you and testified that Joseph Setter had just been on vacation just before the April 17th incident and this ties in beautifully.

So at this point there is no question it's Joseph Setter on this telephone call talking to Harvey Rosenberg.

And then the conversation goes on and they are talking about slacks.

Obviously, ladies and gentlemen, you can review this tape at any time. They are not talking about slacks. The $4800 for the slacks, you will recall on April 17th when Rosenberg purchased the cocaine from Setter he paid $4800.

So obviously what they are talking about here is a narcotics transaction. And the whole flavor of this transaction is a narcotics transaction. They are avoiding talking about the word "narcotics," or "cocaine."

And they talk about the forthcoming deal that is to take place. And there is discussions about previous transactions that the defendant Joseph Setter had.

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And then at the end of the conversation Harvey Rosenberg asks Joseph Setter for his residence because he wants to know where he should go to purchase the narcotics. And Harvey Rosenberg says, "All right, what is the address?" And they go on.

And then the second to the last page Joseph Setter gives Harvey Rosenberg his address, 54-16 Glenwood Road.

Now, that ladies and gentlemen, as we all know by now, is the residence of Joseph Setter. Does that indicate to you that Joseph Setter was on this telephone call or does it not indicate that.

There was more evidence, ladies and gentlemen, with respect to the identity of Mr. Setter on this telephone call. Sgt. Rawald and Agent Richel interviewed the defendant approximately two to two and a half hours after his arrest. They became familiar with his voice. They listened to his voice on the tape and they compared it and found it to be the same.

Furthermore, you remember the testimony of I believe it was Officer [illegible]estivo. He said that

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Harvey Rosenberg and Joe Setter know each other. So I think when you add up all these factors, you have to come to the conclusion that it can be none other than Joseph Setter on this telephone call.

And, incidentally--I will talk about these other two telephone conversations and this Kel set later. But throughout Mr. Rosenberg or Det. Copeland referring to Joe, Joe, again indicating it's the defendant Joseph Setter.

Then we learned, ladies and gentlemen, pursuant to the April 10th telephone conversations, on April 17th Mr. Rosenberg meets the agents at the New York Joint Task Force. At that time they decide how they are going to purchase a quantity of cocaine from Mr. Setter. At that time Mr. Rosenberg is wired up with a Kel recording device. This is done in the presence of the agents.

Approximately 5:00 P.M. the agents go with Rosenberg to Setter's residence, 54-16 Glenwood Road. Rosenberg is searched before he enters Setter's residence. He is found to have nothing on him but approximately $12 in currency.

Rosenberg goes into Setter's residence.

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He stays there for a short while, he comes out of Setter's residence and goes to Det. Copeland's car. He tells Det. Copeland that Setter wants $4,800 for the eighth of a kilogram. Det. Copeland gives him the $4,800.

Incidentally, ladies and gentlemen, you will recall there was surveillance in this case. Officer Golub saw the defendant Setter pull up in a late model Pontiac with dealer's plates number 42-852. That, as we just heard today, is the dealer's plates that Exclusive Motors has. Golub observed Setter enter his residence shortly before Harvey Rosenberg goes in to purchase the narcotics.

Incidentally, Officer Golub also saw Setter leave his residence shortly after the narcotics transaction was consummated.

So getting back to Rosenberg, he gets the $4,800 from Det. Copeland. He goes into Setter's residence. He purchases an eighth of a kilogram of cocaine and the transaction is consummated.

Now, we have heard there was a recording made of this conversation. And again, if you want to hear it in your deliberations, these recordings can be replayed.

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Now, I am not going to review in detail the recordings, ladies and gentlemen. But suffice it to say the defendant Joseph Setter indicates his complete familiarity with the narcotics business. He is talking about 1-26. He is talking about how to bag cocaine. He is talking about how to cut cocaine. He is talking about kilograms and talking about previous transactions he has had. And I will read from one excerpt. Setter--I will delete the profanities--believe me, I know what I'm doing.

MR. KLEIN: I object to reading from this. This is not evidence. It's the tape that governs. This is merely a guide and reading from a guide, and it's up to the jury to determine whether that guide is what they heard and what actually came across the tape.

THE COURT: Overruled.

I will permit the prosecutor to point to those areas that he feels the jury should listen to or should hear if they are interested in it, of course. We know, of course, the transcripts are not for the jury's use. The only thing the jury would be able to do is hear a replay of the

A-682

tapes. But I will permit the prosecutor to point to those portions of what he may desire to point out to the jury.

MR. APPLEBY: Setter says, "I know, I know, and believe me, I know what I'm doing. I didn't start this yesterday and I didn't do this--like today is the first time. Now, you know I know what I'm doing. The only way to control over this thing is to do it, you know, the way I know that it's going to work. If I start around every time I got to reach out, it's just like, you know, when you're dealing with a wholesaler and you give him a check, he gives you a check and the thing bounces. You learn your lesson and well, this situation is the same way."

And then later on, ladies and gentlemen, and you can listen to this tape carefully if you want to or if you wish to, but at one point I believe it's at Page 2, we hear the sound of a file cabinet open, and that's the sound of the file cabinet where Setter kept the cocaine that he is dealing in.

MR. KLEIN: I hesitate to interrupt, but that's rather speculation, isn't it?

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THE COURT: I would say it's speculation, except that if he wishes to so state as to count five. But it is speculation. I agree with you.

MR. APPLEBY: All right, your Honor.

Then they start talking about weighing the cocaine, talking about kilograms and spoons. And then Rosenberg, according to this tape, leaves, goes to the outside and talks to Officer Ryan.

He says, "All right, Jack--" and you even hear the voice of Det. Copeland when he says something, and later Det. Copeland says he is standing there watching. But you can hear closely that it was Det. Copeland's voice.

Ladies and gentlemen, I think it was approximately seven agents who were surveilling Harvey Rosenberg.

Now, were they there on April 17th or not there? Does this recording indicate that Harvey Rosenberg was at Joseph Setter's residence? Does all the evidence in the case indicate that Harvey Rosenberg was at Joseph Setter's residence?

Ladies and gentlemen, a quantity of cocaine, as I said before, was seized from his residence on July 3rd. Does that indicate to you that in fact on

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April 17th, 1975, Joseph Setter sold an eighth of a kilogram to Harvey Rosenberg?

And I mention these things, ladies and gentlemen, because the defendant raised an alibi. He claims this never happened. He claims he was not there on April 17th. And he claims he didn't sell to Harvey Rosenberg an eighth of a kilogram on that date.

And we go to April 24th. And this is where the actual introduction of Det. Copeland to Joseph Setter occurs. Mr. Rosenberg introduces Det. Copeland to Joseph Setter and this occurs at the Grotta D'Oro Restaurant.

And again, ladies and gentlemen, this transaction was observed by Officer Ryan and I think it was three other agents. And you will recall that Bernard Meltzer told you on this April 24th day, this is when the stabbing incident supposedly occurred at Exclusive Motors.

But on that date the defendant is seen with dealer plate 42-852. There is an introduction and then Joseph Setter says to Det. Copeland that he would like to deal in cocaine with him but he would like to deal in a few smaller packages first and

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they agreed to that and they agreed at a future time they will deal in larger quantities.

At that point Joseph Setter gives Det. Copeland his telephone numbers; the first is that he gives his home telephone number and the other two are the business telephone numbers. And again, that's in evidence and you can look at it.

Does this indicate that on April 24th Joseph Setter met with Det. Copeland and Harvey Rosenberg or does it not indicate that?

Then we get to April 28th, ladies and gentlemen. At that time Det. Copeland goes directly to Joseph Setter's residence at 54-16 Glenwood Road. Again he is being surveilled by approximately seven other agents from the New York Joint Task Force. Det. Copeland goes into Setter's residence. Setter puts him in the kitchen. He says he has to go into the living room.

At that time Det. Copeland hears a female's voice. During the transaction Joseph Setter gives Det. Copeland a plastic bag of cocaine and a vial. Here it is, Exhibit 3 is the vial to Det. Copeland. Exhibit 2 is the plastic bag.

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Did Joseph Setter give Exhibit 2 and Exhibit 3 to Det. Copeland or did he not? Where did these exhibits come from? Were they just manufactured out of thin air?

And then Det. Copeland inspects the merchandise, the cocaine. They put it on a triple beam scale and it's determined that it's slightly light.

Then Joseph Setter goes back into the living room and he says, "I'll rectify these matters."

He comes back out and he adds a little bit cocaine in the plastic bag. He blamed the shortage on his girlfriend Debbie Pernice and he says she is messing around with it.

Finally Setter told Det. Copeland he had a quarter of a kilogram available in the future and they would be able to deal with that quarter of a kilogram.

Det. Copeland gives him $5,500. Det. Copeland receives the eighth of a kilogram and the transaction is complete.

Setter takes the $5,500 and he places it in his yellow terry cloth robe.

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Det. Copeland testified he had a yellow terrycloth robe.

I ask, if you recall, Debbie Pernice, whether he owned a yellow terrycloth robe and she said he did.

How did Det. Copeland know that. He knew that because on April 28th he was at Setter's residence and he did receive an eighth of a kilogram of cocaine.

Incidentally, I also asked Det. Copeland to describe the inside of Setter's residence. And you can hear that testimony if you want to. But to make a long story short, he described that residence exactly the same way Debbie Pernice described the residence.

How did Det. Copeland know the layout of that home?

Then, ladies and gentlemen, there was another tape recording played for you and that was on May 19th when Det. Copeland placed a call, again to telephone number 773-0268, the number of Exclusive Motors.

Det. Copeland says, "Hello, can I speak to Joe?"

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Setter says, "Speaking."

And then they have a conversation and Det. Copeland complains about the quality of the cocaine.

And again Mr. Setter in this conversation indicated his complete familiarity with how cocaine is distributed on the street level. He knows how it works.

But the important thing in this case, ladies and gentlemen, in this conversation Copeland and Setter referred to the little bottle that Copeland had just received from Setter on April 28th. Copeland says, "You told me that would strengthen things, you know what I mean."

Setter, "Yes, the first one, the first one you said was better."

Det. Copeland, "The little bottle."

Setter, "Yeah."

What is the little bottle? The little bottle is Government's Exhibit 3.

This conversation is referring back to the April 28th transaction that Copeland and Setter engaged in.

So again, does this conversation indicate to

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you that April 28th, 1975, Det. Copeland purchased an eighth of a kilogram of cocaine from Joseph Setter or does it not?

Now, ladies and gentlemen, that very briefly was the Government's case. And as is true in most criminal cases, the defense stategy emerged in the cross of Mr. Klein. And I suggest to you that if you analyze the cross in this case you realize not that--all that you heard was smoke screens, smoke screens intended to divert your attention from what really happened in this case.

Remember the cross about the chain of custody, how many days each person in the chain from the vault to the chemist held it, held the cocaine.

MR. KLEIN: Your Honor, this is improper. It's part of my defense. I have a right to check the chain of custody and I don't like it labeled like a smoke screen. It's not right.

THE COURT: No, he has every right to check the chain of custody as part of the defense and there should be no comment that there was anything improper when they request that in the Government's case.

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MR. APPLEBY: Ladies and gentlemen, there was further cross-examination on breakings in the tapes. There was cross-examination on whether the field test indicated the fact whether it was cocaine. There was lengthy cross-examination of Dr. Sawinski. And there was cross-examination of Det. Copeland, whether he is color blind or not color blind.

What was the point? What is he trying to prove?

Is this cocaine or is it not cocaine? Of course it is.

And I suggest to you, you have heard nothing in this case which may suggest otherwise.

MR. KLEIN: May I ask for an instruction at this point? I am not required to do anything. It's the Government's burden of proof and I have a right to defend.

THE COURT: That's right. You don't have to do anything. It's the Government's responsibility.

MR. APPLEBY: After the Government rested in this case, ladies and gentlemen, the two pronged defense in this case really emerged.

The first we had heard was character. The

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defendant called a couple of friends of his, a couple of people who knew him for a period of time, who testified that Joseph Setter has an excellent reputation in the community for truth and veracity.

Now, ladies and gentlemen, Mr. Klein has a right to present this evidence, there is no question about it. But what did those witnesses have to do with the facts of this case? What do those witnesses who know nothing about what occurred on April 28th, April 17th and July 3rd have to do with this case? Why were they called?

And again I suggest to you that it's a smoke screen. They tend to divert your attention from the real issues in the case.

MR. KLEIN: Your Honor--

THE COURT: That's his opinion. You you tell them it's not a smoke screen when you get up.

MR. KLEIN: I certainly will.

THE COURT: Is that he has latitude when he speaks of the defense, he can say that. This is a different area.

MR. APPLEBY: Incidentally, ladies and gentlemen, when I talk about the defense here, entrapment is not an issue in this case. There is

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no issue of entrapment and you shouldn't speculate about it.

I believe at one point Mr. Klein through his cross-examination tried to raise this issue of entrapment.

MR. KLEIN: I move for the withdrawal of a juror and the declaration of a mistrial. This is improper at this time and in view of what we discussed in chambers, your Honor.

THE COURT: The application is denied.

MR. KLEIN: I certainly object to this type of summation.

MR. APPLEBY: Your Honor, I am just trying to point out what is not in the case here. I think I am entitled to it.

THE COURT: I will permit him, I will permit him.

MR. KLEIN: As Judge Bramwell will charge you, entrapment is not an issue in this case.

THE COURT: I don't intend to charge as to that. It's not an issue.

MR. APPLEBY: That's correct, your Honor.

THE COURT: I won't charge it.

MR. KLEIN: May we approach the side bar for

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a moment.

THE COURT: We can speak at the side bar.

(The following takes place at side bar out of the hearing of the jury.)

MR. APPLEBY: Your Honor, this is fair comment. I am entitled to show what he has brought up and not brought up. This is fair comment.

THE COURT: Keep your voice down.

MR. KLEIN: I am asking for a charge that he doesn't have to take the stand and not having to comment. You're putting a burden on me to answer questions in the case.

THE COURT: You cannot put a burden on him.

MR. APPLEBY: I am trying to show that itwas implied by his cross-examination.

THE COURT: Yes, but you cannot put a burden on him.

MR. APPLEBY: He raised the issue and I am trying to say it's not in issue and I am showing how the defense shifts its issue.

THE COURT: That I will let him do.

MR. KLEIN: I am allowed to do that, am I not?

THE COURT: Come back.

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THE COURT: That I will let him raise as fair comment.

MR. KLEIN: That we changed the defenses?

We never raised any--the only one who can raise the entrapment issue is the defendant when he takes the stand.

Anytime he mentions entrapment the jury will wonder why he didn't take the stand to prove it.

MR. APPLEBY: I am trying to show he implied certain things and then he shifted positions.

THE COURT: This is what happened in the case.

MR. KLEIN: What good is the instructions that my man didn't have to take the stand? It puts a burden on him to answer something not in the case.

THE COURT: What I will do to clear it up is just to cut it off right away.

MR. KLEIN: You said it already.

THE COURT: Cut it off. Don't continue.

(The following takes place in open court and in the presence of the jury.)

MR. APPLEBY: Ladies and gentlemen, finally the defendant raise the defense of alibi, simply stating, he said, on April 17th, 1975, he didn't

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sell any narcotics to Harvey Rosenberg. And on April 28th, 1975, he didn't sell any narcotics to Det. Copeland.

And, incidentally, ladies and gentlemen, I would like to point out one thing. With respect to the July 3rd, 1975 seizure, I would like you to listen very carefully to the remarks of Mr. Klein and listen and see whether Mr. Setter has an alibi for July 3rd, 1975. Because I can suggest to you, you can search and search his remarks and search and search the record in this case and you will find no alibi for that day.

The evidence of the seizure from the defendant's residence on that date stand absolutely uncontradicted in this case. And that's very very important to keep in mind when you begin your deliberations.

As I said, the defendant claimed his innocence. He said he had nothing to do with the 17th and 28th transactions. And if Mr. Setter is right, not only that the Government failed to meet its burden in the case, but what we have been engaged in the past week or so is a terrible exercise of injustice.

And if he was present, ladies and gentlemen,

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if he did engage in those transactions on the 17th and 28th, then he is guilty as charged and it's your obligation to render a verdict that says so.

Now, in support of his alibi Mr. Setter called a number of witnesses. The first witness was Bernard Meltzer. He testified that on April 17th Joseph Setter was at Exclusive Motors the entire day, non stop, uninterrupted, from approximately quarter of nine to 6:30. And Mr. Meltzer said he remembered this distinctly because they had a difficult job to do on a Mercedes Benz and because that was the day that Joseph Setter did the payroll.

Mr. Meltzer remembered fifteen months ago all these events absolutely distinctly, no doubt about it in his mind. He remembers this Mercedes Benz absolutely distinctly. He remembers exactly how it was worked upon. He remembers there was a mechanic next to Mr. Setter working on it and from his office he was able to see the entire premises of Exclusive Motors and he kept his eye on Joseph Setter.

I would suggest to you, ladies and gentlemen, if you use your common sense and your everyday experience, that testimony is just not credible.

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How is it as Mr. Meltzer sits on this witness stand now and reflects on an event that occurred fifteen months ago, how is it that he is able to recall so distinctly that he had his eye on Mr. Setter the entire day for approximately nine hours or so?

And remember, Mr. Meltzer told you Exclusive Motors are on premises 100 yards by 100 yards. And Mr. Meltzer first testified to it--he may not have remembered--but 100 yards is the length of a football field. And Mr. Meltzer, from his little desk, is able to watch Joseph Setter's movements and every movement on this 100 yards by 100 yards premises.

I suggest to you that it does not make sense and there were a lot of things in Mr. Meltzer's testimony that just didn't make sense.

He was able to remember the Mercedes Benz very well. And when I asked him about the yellow Cadillac, he had no recollection of it.

And finally after having to produce his records and coming back to court, he remembered there was a yellow Cadillac.

Do you remember, ladies and gentlemen, what

you did a week ago as distinctly as Mr. Meltzer remembers an event he, that occurred fifteen months ago?

Mr. Klein asks him, "Did you conjure up the defendant Joseph Setter working on that car distinctly or did you conjure up him doing that payroll distinctly?"

And Mr. Meltzer says, "Yes, beyond all doubt."

He conjured up, ladies and gentlemen. There is no question about that.

But there was some very odd things about Mr. Meltzer's testimony. For example, under the Rules of our Criminal Procedure the defendant has to give the Government notice of an alibi. When they give us notice of an alibi they must give us the names of the witnesses and addresses of the witnesses so we can contact and interview them when we want to.

How is Mr. Klein--and you recall when I asked Mr. Meltzer, he testified prior to the agents coming down and interviewing him he had no knowledge of the Setter case, he had no knowledge that Mr. Setter was indicted.

How is Mr. Klein's office going to come up

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with the name of Bernard Meltzer as a possible witness without Mr. Setter or someone on Mr. Setter's behalf talking to Mr. Meltzer?

Obviously Mr. Meltzer talked to Mr. Setter or someone on his behalf. How else could they have gotten his name?

I suggest to you, ladies and gentlemen, and I will not go into detail with respect to Mr. Meltzer s testimony, but there was some very odd things about it with respect to the stabbing incident that he remembered all of a sudden on the stand so well so he can give an alibi to the defendant on April 24th.

I suggest to you Mr. Meltzer didn't prove the defendant's alibi whatsoever. As a matter of fact, I would say he helped the Government prove its own case. Because after the Government requested him to do it and after about two days he finally was able to bring in those plates which he told you at first he had no knowledge of or he couldn't remember. And those plates, ladies and gentlemen, I forget the number now, are the same plates that the agent saw Joseph Setter using on his automobile on April 17th and April 28th.

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And also, finally he brought in those records with respect to the purchase of automobiles. And we will learn that as a matter of fact, although at first he wasn't so eager to tell us, that in fact he had a yellow Cadillac on his premises at that time. He told us it was really beige. I will let you determine whether that was true or not.

But to make a long story short, I suggest to you that Mr. Meltzer was not entirely candid with you in this case. I know what you expected when I was cross-examining him as in Perry Mason, I don't think he was going to break down crying and admit it was a phony alibi. And this is not Perry Mason or anything of the sort.

When you take a witness like Mr. Meltzer, you have to study him and study his demeanor and you have to use two aspects each one of you have, and that is your common sense and your everyday experience, assessing Mr. Meltzer's testimony on a whole. You have to ask yourselves, is he somebody I can believe based on his demeanor, based on what I feel in my gut, do I feel he was being candid with me and candid with the Court.

Now, Mr. Setter has April 17th covered. He

has an alibi for April 17th. And luckily for him, Mr. Meltzer gave him an alibi for April 24th. And he probably didn't expect it.

Then we go to April 28th and again Mr. Setter told us on April 28th he had nothing to do with Det. Copeland; Det. Copeland was not in his house purchasing cocaine; that in fact the agents were not there surveilling Det. Copeland; that in fact the agents and Det. Copeland, what they told you was a complete lie.

Joseph Setter told you through Debbie Pernice that rather than that occurring, he was at Cookie's Restaurant and after he went to Cookie's Restaurant he went to, believe it, Mr. Setter's mother-in-law, Jean Saccende.

I don't want to dwell at length on Miss Pernice's testimony. But when I suggest to you, ladies and gentlemen, to consider the motive in this case--and incidentally, that is the key issue in this case, the motive to lie. Each witness you should look at and examine and try to look at what stake that witness has in the outcome of this case.

Ask yourself whether Debbie Pernice has a

A-[redacted]702

stake in the outcome of this case. Is she an interested participant? She's the fiance of the defendant.

I think she stated at the end of her testimony that she wouldn't be here if it wasn't for the defendant. So when you consider her m otive in this case, consider that testimony.

And when you ask yourself who to believe in this case, whether you should believe Debbie Pernice or Bernard Meltzer or all the agents who testified in this case, ladies and gentlemen, there is a direct conflict. Obviously somebody in this case is not telling the truth. It's either the agents or the alibi witnesses.

Consider the motive to lie. It's crucial.

And again, ladies and gentlemen, I would suggest to you that Miss Pernice helped prove the Government's case again. As I said before, Miss Pernice testified the defendant did have a yellow terrycloth robe and she did describe the living quarters of herself and Mr. Setter, which matched almost exactly to what Det. Copeland testified to.

Finally, ladies and gentlemen, there was the testimony of Rita Small and Jean Saccende.

A-[redacted]703

And they testified sometime between 11:00 and 11:30 Miss Pernice and Mr. Setter were at Miss Saccende's house celebrating Debbie Pernice's birthday.

I would say to you--I did not cross-examine those witness, ladies and gentlemen, because they do not establish an alibi about Mr. Setter. They said it's possible they could have arrived after 11:15, approximately 11:30. So they don't give him an alibi whatsoever.

And incidentally, Miss Saccende's house is just five minutes from the Setter residence. So there was no point in cross-examining them.

Now, with respect to this alibi defense, I would ask the defense the following question: Where is their alibi for April 24th? The Grotta D'Oro? You recall Det. Copeland said that he met the defendant there again on April 24th. Was the defendant there meeting Det. Copeland on those dates or was he not? Does Joseph Setter know Harvey Rosenberg or doesn't he know Harvey Rosenberg? Did he meet Det. Copeland or did he not?

Now, what in effect these witnesses are saying to you, ladies and gentlemen, that is Miss Pernice and Mr. Meltzer, is that Det. Copeland lied,

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Police Officer Ryan lied, Agent Richel lied, Sgt. Rawald lied, Officer Marrero lied, Officer Golub lied, all of the agents lied and they lied in order to frame an innocent person; that's the effect of their testimony.

What they are saying is that this stuff was never received from the defendant, it was made up out of thin air.

Is that what happened, ladies and gentlemen? Why are the agents going to get up on the stand in the United States District Court under the penalties of perjury and say that Joseph Setter was dealing in narcotics when he wasn't? Why? What is the motive for that?

Again, what is their motive to lie? Why would they risk their reputation in order to frame an innocent person? Aren't there enough guilty narcotics dealers walking around in the street, ladies and gentlemen, so the agents don't have to get up on the stand and frame an innocent person? How did they get on to Joseph Setter? How did they start to investigate him? Did they open the Brooklyn telephone directory and run their fingers down the pages and stop at Joseph Setter and say

A-[redacted]705

that that's a good person to frame?

Obviously that didn'thappen. The agents were testifying to events that actually occurred.

How did this so called frame up occur? Where did it occur? For what reason? What were the circumstances? Did they all get together one day and decide to frame the defendant?

It's absurd.

And again I point out to you, ladies and gentlemen, with respect to this alibi, the fifth count in this indictment which talks about the seizure of cocaine stands uncontradicted. You will hear, I suggest, from Mr. Klein nothing that would contradict the fact that the defendant on July 3rd had a large quantity of cocaine at his residence.

When you consider the fact that--that that fact, the fact of his possessing that large quantity of cocaine on July 3rd, you must ask yourselves if that's true, if that's uncontradicted, then is it true on April 17th, 1975, the defendant sold narcotics to Harvey Rosenberg. And if it's true and if it's uncontradicted that the defendant is caught in possession of a large quantity of cocaine, red-handed, then you must ask yourselves, is it true

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on April 28th, 1975, he in fact did sell narcotics to Det. Copeland.

MR. KLEIN: I am going to object to that. I say that's an inference on an inference. These are separate counts and each should stand o their own feet.

THE COURT: I will permit it.

MR. KLEIN: I submit that--

THE COURT: I will permit it. You can argue when you get up.

MR. KLEIN: All right.

MR. APPLEBY: In conclusion, ladies and gentlemen, again I will say to you this has been a simple case, an overwhelming case. What happened here is absolutely obvious. On April 17th the defendant sold narcotics to Harvey Rosenberg pursuant to a recorded telephone conversation. On April 28th he sold narcotics to Det. Copeland unbeknownst to him, acting in an undercover capacity. And on July 3rd, 1975, a large seizure of cocaine was made from his residence. Based on this evidence and for no other reason I will ask you to return a verdict of guilty.

THE COURT: Thank you, Mr. Appleby.

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as to some possible sentencing judge.

Well, I was not the sentencing judge in this case. I didn't know any of the people involved in this case before this case started just as you didn't.

I think we will have rebuttal of Mr. Appleby at this time.

(Mr. Appleby makes a rebuttal argument to the jury on behalf of the United States of America as follows:)

MR. APPLEBY: Ladies and gentlemen, as I sat down I was very interested in what Mr. Klein was going to do with that seizure, how is he going to get around that seizure. That was in my mind as I sat here and listened to him. I didn't see how he can possibly get around that seizure. But Mr. Klein did try to get around it. He did tell you or at least he implied to you how the cocaine, and that is Government's Exhibit 8, 9, 10, 11, 12, managed to get in that top drawer of the file cabinet. And what he told you or what he implied to you is that the agents at some time or another--he didn't specify--planted the cocaine in the defendant's residence. That's

what he told you! A-70f

Now, ladies and gentlemen, this is a United States District Court and Mr. Klein was given free reign by Judge Bramwell in his summation to make any kind of inference that he wanted to. But I say to you, ladies and gentlemen, that you can search and search this record and you can search and search the cross-examination of Mr. Klein of the agents, and you will not only find this much evidence, not one iota of evidence, not one scintilla of evidence as to how, when, where and why the agents would plant that quantity of cocaine on the defendants. It is simply absurd. It's ridiculous and an insult. And I would like to know how Mr. Klein can make a statement like that, based on what, based on what evidence.

I can come into the courtroom, ladies and gentlemen, and I can say to you in my summation the earth is flat. That's a beautiful summation, the earth is flat. And I have to get witnesses on that stand who will testify that the earth is flat. I can't get up here on this podium and make any statement I want to. But that's what Mr. Klein did. He got up on the stand and he knew there was

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no way around the seizure and he says it's a plant. Well, that's fine. That's Mr. Klein's statement. He says it's a plant.

And what evidence is there of that in this case? I say to you, ladies and gentlemen, it's completely ridiculous. And he says,--well, it's an insult.

And then he says when you consider the indictment in this case, please take each count separately when you come to that fifth count, if you decide he is guilty or just put that aside and consider the other four counts solely by themselves.

And there is no obligation, ladies and gentlemen, upon you to do that. As a matter of fact, that's not the way one should go about your deliberations. You are entitled when you weigh each count, to weigh the entire evidence in the case. When you consider whether Joseph Setter was dealing in cocaine on April 17th and April 28th, you are entitled to consider the fact that the agents found a large quantity of cocaine in his residence. There is nothing wrong with that.

Mr. Klein would like to say, just put all that evidence aside and forget about that.

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Well, you don't have to forget about it. You are entitled to draw reasonable inferences.

And then if I understood Mr. Klein's summation correctly--and I think this was an implication--he said if you find that the defendant dealed in cocaine on two separate occasions, but not on that specific date, then you must acquit him.

And what he was telling you in effect, ladies and gentlemen, well, maybe my client was a cocaine dealer, but he didn't deal in cocaine on that specific date. That's what in effect he was telling you.

Ladies and gentlemen, the agents testified that the transactions occurred on April 17th and April 28th.

Why, why in God's name are they going to say that they--that Joseph Setter was dealing in cocaine on April 17th and April 28th when he didn't? If they know him to be dealing in cocaine, why would they be making up a fictitious date if he was actually and in fact dealing in cocaine? It's simply ridiculous. There is another point Mr. Klein made. He asked you about how

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could Joseph Setter be dealing in cocaine when he was trying to help out his girlfriend, Debbie Pernice.

Well, I will ask you, I will let you, ladies and gentlemen, decide that proposition on its own merits and whether it has any logic whatsoever.

And I suggest to you very simply, it's not entirely impossible for somebody having a relationship with a girlfriend and at the same time dealing in narcotics.

Then Mr. Klein told you--and which is in fact true and there is no doubt about it--that there was no direct evidence that--as a matter of fact, ladies and gentlemen, he was wrong about that--there was direct evidence that Harvey Rosenberg and Joseph Setter had a narcotics transaction, because you have the April 17th Kel recording. And if you listen to that recording you will find they were dealing in narcotics. And even if that wasn't true, if there was no proof of the Kel recording, you are entitled to reach a verdict based upon circumstancial evidence.

And Judge Bramwell would tell you that

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contrary to popular opinion, circumstantial evidence is entitled to the same weight as direct evidence.

Harvey Rosenberg went into Setter's residence without anything on his person in the presence of the agents. He comes out of Setter's residence with the cocaine. Setter is seen entering the residence before the transaction and is seen coming out of his residence just after the transaction.

Was there a narcotics transaction between Joseph Setter and Harvey Rosenberg or wasn't there?

And again, Mr. Klein implied to you that these tapes were, quote, manufactured and created.

Again, where does he come off saying that? What evidence is there that these tapes were manufactured or created? What on cross-examination would you--did you hear that made you feel these tapes were doctored in any respect whatsoever?

I suggest to you it's Mr. Klein's statement to you based upon nothing. Because he has to get around the tapes and he says anything that comes off the top of his head that gets around the tapes.

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The telephone calls, he says there is no proof there is Joseph Setter on the telephone calls because Sgt. Rawald said he couldn't say it was definitely Joseph Setter without knowing the other evidence in the case. And Mr. Klein says to put aside the other evidence, it doesn't count.

And why doesn't it count? You, ladies and gentlemen, heard the same evidence that Sgt. Rawald knows about during the course of his investigation. You are entitled to take all the evidence to reach your determination as to whether it's Joseph Setter on those recordings.

However, Mr. Klein doesn't address himself to the plain fact in the first recording when Mr. Rosenberg asked for Joseph Setter, Mr. Setter identifies himself. You didn't hear any argument about that.

And then Mr. Klein talks about the yellow bathrobe and the description of the house.

It's not a big deal, ladies and gentlemen. I have pointed that out only to show to you, ladies and gentlemen, that their witness in fact has corroborated our case.

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But what Mr. Klein is in error about is that Det. Copeland wrote up his report after the transaction, just after the April 28th transaction, before the July 3rd seizure. In his report he talked about the yellow bathrobe and the description of the house. So how could he have learned about the description of the house from the agents when the agents first entered Joseph Setter's residence on July 3rd?

And then Mr. Klein tried to explain that curious thing about Mr. Meltzer's testimony. And he said, well, if I had to establish an alibi for myself last night, I would say go to my wife and ask what I was doing because I knew I wasn't doing anything wrong. And that's perfectly understandable to what occurred last night. What happened here is that it occurred fifteen months ago. So the analogy just didn't hold water.

Again, ladies and gentlemen, I think I have covered all the points Mr. Klein raised. I would say to you that the Government has proved its case not beyond a reasonable doubt here, beyond all doubt. There has been overwhelming evidence of the defendant's guilt and I will ask you to

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return a verdict of guilty.

THE COURT: All right.

Ladies and gentlemen, we are going to adjourn for the day. You are still on trial. Tomorrow I will charge you. And after the charge you will deliberate on this case.

We would like to start at 10:00. I would ask you to come possibly at 9:30 because I will order lunch for the jury and the lunch will be there so you may have your lunch during your deliberations. So if you come about 9:30 or shortly thereafter you can order your lunch and at 10:00 we will start.

And I say to you again, do not discuss this case with anyone on or off this jury. You are not to discuss it until the Court gives it to you for your deliberations tomorrow.

The jury may leave for the day.

(The jury leaves the courtroom and the following takes place out of the presence of the jury.)

THE COURT: Anything further?

MR. KLEIN: No, sir, your Honor.

MR. APPLEBY: No, your Honor.

MORNING SESSION

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(The following takes place out of the presence of the jury.)

THE COURT: Ready to proceed?

MR. APPLEBY: Yes, your Honor.

THE COURT: All right.

Bring in the jury.

(The jury enters the courtroom at 10:10 A.M.)

(THE COURT CHARGES THE JURY AS FOLLOWS:)

THE COURT: Good morning, ladies and gentlemen.

Madam Forelady, ladies and gentlemen of the jury:

We now come to the final stage of the proceedings. The Court will now charge you on the law to be applied to the facts in the case.

As you may recall, I initially gave you a precharge as to the manner in which the case will be presented to you. I told you most of the evidence in the case will come in the form of the testimony of witnesses and that you are to pay special attention to the manner in which the witnesses testified.

I believe I also instructed you that you

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will be the judges of the facts in the case, that being your sole province, and that your recollection of the facts after having heard all of the evidence in the case, the testimony of witnesses and the documentary proof, was to control the determination of the issues. Likewise at that time I told you that I would be the judge of the law. This has not changed at this stage of the proceedings.

I will not review the facts in this case for you because I am certain that with summations by the attorneys there is no need for the Court to review the facts.

In any event, if you find that there is some fact in the case that you may have forgotten or don't recollect or you can't agree with each other in your deliberations, you can have it read back from the record and that will, I am sure, refresh your memory.

In any event, I am the judge of the law. You must accept what I say to be the law in this case.

Now, the attorneys have been permitted by the Court and by the rules to make opening statements and summations to you. Under no circumstances are

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the statements they have made by way of opening or by way of summation to be taken as evidence. However, the Court and the law does permit you to take the arguments that they have proferred before you and weigh those arguments. And if you agree with what they have said on either side of the case, you may use those arguments in your deliberations and in discussing the case with each other. And try to convince one another as to what the final determination shall be with reference to the deliberations at hand.

If you feel that the arguments are not communsurate with the testimony and the proof of the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed and you may discuss that portion of it if you so desire.

Now, of course, I also said to you that during the trial the Court would be the judge of the law. Likewise, as to motions which at times we had at a side bar, as you may recall, that was not for the purp ose of keeping any of the proof

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from you, but were matters of law that were discussed between the attorneys and the Court itself and should not have come before you.

In any event, if you feel you have discovered by some stretch of the imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your mind. Because I tell you here and now, I have come to no conclusion in this case, nor have I indicated to you in any way whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendant. That is your province and your duty. You should not try to weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent. And they have a right to exercise as much forcefulness as they desire in their questioning or otherwise in presenting their case.

I say this because this is within the framework of the ordinary trial.

No statement, ruling, remark or comment

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which I made during the course of the trial was intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts.

If at any time I made any comment regarding the facts, you are at liberty to disregard it.

At times I asked questions of the witnesses. When I did so, it was for the purpose of bringing out matters which I felt should be brought out and not in any way to indicate my opinion about the facts or to indicate the weight I felt you should give to the testimony of the witnesses.

Also, you should not now show prejudice toward the lawyer or his client because I found it necessary to admonish the lawyer during the course of the trial. It is the duty of the Court to admonish an attorney who out of zeal for his cause does something which is not in keeping with the rules of evidence or procedure. You are to draw no inferences against a side to whom an admonition of the Court may have been addressed during the trial of the case.

As to objections and rulings, it is the duty of the attorney on each side of the case to

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object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence.

As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the Court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely and may draw no inference from the wording of it or speculate as to what the witness would have said if he would havebeen permitted to answer any question.

In determining the facts, the jury is reminded that before each member was accepted and sworn to act as a juror, he or she was asked questions regarding his or her competency,

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qualifications, fairness and freedom from prejudice or sympathy. On the faith of those answers the jury was accepted by the parties. Therefore, those answers are as binding on each of the jurors now as they were then and should remain so until the jury is discharged from consideration of this case.

You cannot decide that you do not like the sections of the law that I will quote to you or any other part of the charge. You have the obligation of accepting the law as I charge it, just as I have the obligation of accepting your findings of fact in your ultimate verdict as to the guilt or innocence of the defendant as to each charge. It lends to predictability and stability if judges throughout the country in types of charges such as this charge uniformly and substantially so and that juries accept it.

It would be unfair for you to decide this case on your own notions of what the law should be and another jury decide it on their own notions what the law should be. That is why the obligation should be a firm one and one that you should understand.

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Of course, you know by this time that this case has come before you by way of an indictment presented to a grand jury sitting in this Eastern District of New York. That indictment charges the defendant with the count I shall now read to you.

Remember, the indictment is merely an accusation, merely a piece of paper. It is not evidence and it is not proof of anything. The indictment reads as follows:

Count one. On or about the 17th day of April, 1975, within the Eastern District of New York, the defendant Joseph Setter did knowingly and intentionally possess with intent to distribute approximately 126 grams of cocaine, a schedule two narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1).

Count two. On or about the 17th day of April, 1975, within the Eastern District of New York, the defendant Joseph Setter did knowingly and intentionally distribute approximately 126 grams of cocaine, a schedule 2 narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1).

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Count three. On or about the 28th day of April, 1975, within the Eastern District of New York, the defendant Joseph Setter did knowingly and intentionally possess with intent to distribute approximately 125.85 grams of cocaine, a Schedule 2 narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1).

Count four. On or about the 28th day of April, 1975, within the Eastern District of New York, the defendant Joseph Setter did knowingly and intentionally distribute approximately 125.85 grams of cocaine, a Schedule 2 narcotic drug controlled substance, in violation of Title 21 United States Code, Section 841 (a)(1).

Count five. On or about the 3rd day of June, 1975, within the Eastern District of New York, the defendant Joseph Setter did knowingly and intelligently (sic) possess with intent to distribute approximately 335.95 grams of cocaine, a Schedule 2 narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1).

Now I will give you some introductory

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remarks regarding the statute applicable--there is just one statute applicable in this case.

The individual counts of this indictment are based upon two separate provisions of the very same statute, Title 21 United States Code, Section 841 (a)(1).

Now you will find that while I explain each separate count to you, that I will reread the pertinent portion of the statute and the essential elements of the offense set forth therein. I do this in order to facilitate your understanding of the applicable law controlling the individual count.

I also do this to emphasize though the counts in the indictment may in certain instances be based on the very same section of the very same statute, each count charges a separate offense occurring at a separate time. Therefore, each count should be carefully, seriously and separately and individually considered by you as such.

Ladies and gentlemen, you will note that the indictment charges in each count that the offense was committed on or about a certain date.

As to count five, the proof need not

establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

However, with respect to counts one, two, three and four, a different rule controls. As to these counts it is necessary that the proof establish with certainty the exact date of the alleged offense. Therefore, the evidence in the case as to counts one, two, three and four must establish beyond a reasonable doubt that the offense was committed on the exact date alleged in the relevant count of the indictment.

Alibi evidence: The reason for the different treatment of counts one, two, three and four to that accorded to count five is because on counts one, two, three and four evidence has been introduced tending to establish an alibi which amounts to a contention that the defendant was not present at the time when, or at the place where he is alleged to have committed the offenses charged in counts one, two, three and four of the indictment.

If after consideration of all of the evidence

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in the case you have a reasonable doubt as to whether the defendant was present at the time and place the alleged offenses were committed, you must acquit him on counts one, two, three and four.

You are to remember that it is part of the Government's burden of proof to establish the defendant's presence at the scene of the alleged offense. The defendant does not have the burden of establishing his alibi. The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Count one of the indictment is based on Title 21 of the United States Code, Section 841(a)(1), which provides in pertinent part as follows:

It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance.

You are instructed as a matter of law that cocaine is a Schedule 2 narcotic drug controlled substance.

Essential elements of the offense. Count one of the indictment charges that the defendant

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did knowingly and intentionally possess with intent to distribute cocaine, a Schedule 2 narcotic drug controlled substance.

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt are, first: That the defendant Joseph Setter possessed cocaine, a Schedule 2 narcotic drug controlled substance, on the 17th day of April, 1975, within the Eastern District of New York; and, second, that the defendant Joseph Setter did so possess with the specific intent to distribute cocaine, a Schedule 2 narcotic drug controlled substance; and third, that the defendant Joseph Setter did so knowingly and intentionally.

Please bear in mind that the burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged. Always remember that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Count two of the indictment is based on Title 21 of the United States Code, Section 841 (a)(1)

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which provides in pertinent part as follows:

It shall be unlawful for any person knowingly or intentionally to distribute a controlled substance.

You are instructed as a matter of law that cocaine is a Schedule 2 narcotic controlled substance.

Essential elements of the offense: Count two of the indictment charges that the defendant Joseph Setter did knowingly and intentionally distribute cocaine, a Schedule 2 narcotic drug controlled substance.

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt, are first: That the defendant, Joseph Setter did distribute cocaine, a Schedule 2 narcotic controlled substance on the 17th day of April, 1975, within the Eastern District of New York; and second, that the defendant Joseph Setter did so distribute the cocaine knowingly and intentionally on the 17th day of April, 1975, within the Eastern District of New York.

As stated before, the burden is always upon the Government to prove beyond a reasonable doubt

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every essential element of the offense charged. Please remember that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Count three of the indictment is based upon Title 21 of the United States Code, Section 841 (a)(1), which provides in pertinent part as follows: It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance.

Once again you are reminded that as a matter of law cocaine is a Schedule 2 narcotic drug controlled substance.

The essential elements of the offense: Count three of the indictment charges that the defendant Joseph Setter did knowingly and intentionally possess with the intent to distribute cocaine, a Schedule 2 narcotic drug controlled substance.

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt, are first: That the defendant Joseph Setter possessed cocaine, a Schedule 2 narcotic drug controlled substance, on the 28th day of April, 1975, within the Eastern District of New York;

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second, that the defendant, Joseph Setter did so possess with the specific intent to distribute cocaine, a Schedule 2 narcotic drug controlled substance; and third, that the defendant Joseph Setter did so knowingly and intentionally.

As stated before, the burden is always upon the Government to prove beyond a reasonable doubt every esssential element of the crime charged. Always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Count four of the indictment is based on Title 21 of the United States Code, Section 841 (a)(1) which provides in pertinent part as follows:
It shall be unlawful for any person knowingly or intentionally to distribute a controlled substance.

You are instructed as a matter of law that cocaine is a schedule 2 narcotic drug controlled substance.

Essential element of the offense: Count four of the indictment charges that the defendant Joseph Setter did knowingly and intentionally distribute cocaine, a Schedule 2 narcotic drug

controlled substance.

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt, are first: That the defendant Joseph Setter did distribute cocaine, a Schedule 2 narcotic drug controlled substance, on the 28th day of April 1975, within the Eastern District of New York; and second, that the defendant Joseph Setter did so distribute the cocaine knowingly and intentionally on the 28th day of April, 1975, within the Eastern District of New York.

As I stated before, the burden is always upon the Government to prove beyond a reasonable doubt every essential element of the offense charged. Please remember that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Count five of the indictment is based on Title 21 of the United States Code, Section 841 (a)(1), which reads in pertinent part as follows: It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlledsubstance.

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You are instructed as a matter of law that cocaine is a Schedule 2 narcotic drug controlled substance.

Essential elements of the offense: Count five of the indictment charges that the defendant J oseph Setter did knowingly and intentionally possess with intent to distribute cocaine, a Schedule 2 narcotic drug controlled substance.

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt, are first that the defendant Joseph Setter possessed cocaine, a Schedule 2 narcotic drug controlled substance, on or about the 3rd day of July, 1975, within the Eastern District of New York; and second, that the defendant Joseph Setter did so possess with the specific intent to distribute cocaine, a Schedule 2 narcotic drug controlled substance; and third, that the defendant Joseph Setter did so knowingly and intentionally.

Please bear in mind that the burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged.

Always remember that the law never imposes

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upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Cocaine is a controlled substance. You have previously been instructed as a matter of law that cocaine is a controlled substance. Now, it is up to you, the jury, and you alone, to ascertain whether or not the material in question in each of the counts presented to you was in fact cocaine. In so doing you may consider all evidence in the case which may aid the determination of that issue, including the testimony of any expert or other witness who may have testified either to support or to dispute the allegation that the material in question was cocaine.

Actual amount of cocaine need not be proved.

In each count of the indictment it is alleged that a particular amount or quantity of cocaine was involved. The evidence in the case need not establish that the amount or quantity of cocaine was exactly the same amount or quantity as alleged in the particular count of the indictment, but only that a measurable amount of cocaine was in fact the subject of the acts charged in the

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particular counts of the indictment.

Definitions: Please bear in mind the following definitions in considering the essential elements of the crimes charged.

Distribute defined. The term distribute means to deliver a controlled substance to the possession of another person which in turn means the actual, constructive or attempted transfer of controlled substances.

Definition of possession: The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person has actual or sole possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.

If you find from the evidence beyond a

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reasonable doubt that the defendant either alone or with others had actual or constructive possession of the cocaine described in the indictment, then you may find that the cocaine was in the possession of the defendant within the meaning of the word "possession" as used in these instructions.

Actual, manual or personal possession is not an necessary element of the crime. It is sufficient if the possession is constructive if the merchandise is shown to be under the control of the person charged though in actual physical possession of another.

The Government does not have to prove that the cocaine was possessed by the defendant for any particular length of time.

Knowingly. An act is done knowingly if done voluntarily or intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or accident or other innocent reason.

Definition of willfully, to act. An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something

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the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law.

Definition of specific intent. This is applicable to all offenses charged in the indictment.

The crimes charged in this case are serious crimes which require proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that a defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operation of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by a defendant and all of the facts and circumstances in evidence which indicate his state of mind.

It is ordinarily reasonable to infer that

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a person intends the natural and probable consequences of acts knowingly done or knowingly admitted.

Reasonable doubt. Now, there are in any case, and this one, two types of evidence from which a jury may properly find a defendant guilty of a crime; one is direct evidence such as direct testimony of an eyewitness, the other is circumstantial evidence which is proof of a chain of facts and circumstances pointing to the commission of the offense.

As a general rule the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

A defendant is presumed innocent of a crime. Thus the defendant,although accused, begins the trial with a clean slate and with no evidence against him. And the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused, so that the presumption of innocence alone is

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sufficient to acquit a defendant, unless you the jury, are satisfied of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. And reasonable doubt is doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act.

Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

You, the jury, will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if the jury views the evidence in the

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case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you the jury should, of course, adopt the conclusion of innocence.

The defendant may be proven guilty either by direct or circumstantial evidence. I have said that direct evidence is the testimony of one who asserts actual knowledge of fact, such as an eyewitness. Also, circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. You the jury may make common sense inferences from the proven facts. It is not necessary that all inferences drawn from the facts in evidence be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence. The test is one of reasonable doubt and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence and the reasonable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from the facts which have been proved.

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You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence.

Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.

Proof of knowledge and intent: Knowledge and intent exists in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circum-

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stances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable, or ordinary, consequences of his acts.

Credibility of witnesses: You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves. And it goes without saying that you should scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind and his or her demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he or she has testified and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side

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of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or from intentional falsehood.

After making your own judgment you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Another test that you can use in determining the truthfulness or credibility of a witness is to use your own good common sense in addition to these essentials that I have given you. You can

use your good common sense as you do in your everyday experience where you must make important decisions based upon what others tell you.

When you decide to either accept or ignore the statements of others, you use your common sense. Your good judgment will say to you somehow or another whatever they say does not appear to be truthful, that somehow or another you just do not believe what they have said. That is your ability to reason, your ability to determine the truthfulness of the person you're speaking with. Likewise, your common sense should be used to determine the weight to be given the testimony of a witness.

You take that same good common sense into the jury room; you do not leave it outside.

In addition to what I have said, use your common sense as a test in exercising your good judgment and in determining whether or not this defendant is guilty of the crimes charged. It is for you to determine whether the witnesses in this case have testified false, whether or not they have an interest in the case, what that interest may be and how great it is and whether

or not they have told you falsehoods. This is all for you to determine.

Every witness' testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case, then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness.

If you find, however, that you can sift through that testimony and determine which of the testimony is true and which was false, then the law allows you to take the portions which were true and weigh it and disregard those portions which were false. That again is within your prerogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all of the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credance. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side. You are not obliged to accept testimony even though the

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testimony is uncontradicted and the witness is not impeached. You may decide because of the witness' bearing and demeanor or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

The Government is not required to prove the essential element of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the offense charged if you believe beyond a reasonable doubt that the witness is telling the truth.

All available evidence need not be produced. The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

However, in judging the credibility of the witnesses who have testified and in considering

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the weight and effect of all evidence that has been produced, the jury may consider the prosecution's failure to call other witness or to produce other evidence shown by the evidence in the case to be inconsistent and available.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence, and no adverse inferences may be drawn from his failure to do so.

Effect of failure of an accused to testify: The law does not compel a defendant in a criminal case to take the stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Absence of informant Harvey Rosenberg equally unavailable to both sides: There has been repeated testimony in this case concerning an informant, Harvey Rosenberg. He has not testified.

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The fact that he has not testified however should not be used by you to infer that his testimony would have been unfavorable to the Government or at variance with the testimony offered by the witnesses for the Government.

Moreover, no unfavorable inference may be drawn against the defendant from the absence of Rosenberg's testimony.

You are not to guess about what Rosenberg would have testified to, but to decide the case on the evidence that has been submitted to you.

And concerning Harvey Rosenberg, with reference to Harvey Rosenberg on occasion the Government is required to use informants to generate cases as the only method available to it. You are not to decide that you do not like this practice. And whether or not you like this practice should not influence your determination.

However, in this regard, please bear in mind that the informant has a vital interest in his activities with the Government when he attempts to show that he is helping the Government so as to receive consideration for his own legal situation.

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Now, as to the tape recording of conversations allegedly taken place between the defendant and third parties: Now, it is obvious an important question for you to determine in your careful consideration in this case is whether or not Joseph Setter is in fact one of the parties to tape recordings of conversations which allegedly took place between the defendant and third parties.

Now, let me emphasize this because it is of crucial importance. The Court has admitted these tape recordings into evidence for your careful consideration and yours alone. The Court has absolutely no feelings one way or the other and has made no judgment as to whether or not Mr. Setter is in fact one of the parties to the taped conversation. The Court has merely found as a matter of law that you should be able to consider these tapes, both as to what was said and as to who the parties were to these conversations.

I cannot emphasize strongly enough to you that by admitting these tapes into evidence I have not formulated an opinion as to the participants' identities and to the substance and import of the conversation. These are questions for you alone to

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decide.

In this regard let me say this to you: The transcripts which you read along with the rendition of the tapes are not evidence, but were merely devices to facilitate your listening. It is only what you have heard and understood which is evidence. This is very important so I will repeat this to you.

It is the tape recordings which are evidence and not the transcripts. These transcripts were given to you only in order that they might assist you in understanding the tape recordings. Therefore, I direct you to rely only upon what you actually heard from the tape recordings. If there is a conflict as to the tape recording and the transcript or if the two don't conform, then you must disregard the transcript.

Furthermore, let me say this to you: If you desire after you have retired for your deliberations, you may have these tape recordings replayed. Just knock on the door and hand a note to the U.S. Marshal which indicates that you would like to hear the tapes again. The U.S. Marshal will present your written note to the Court and I

will have them bring you into the courtroom to re-hear the tapes.

The function of law enforcement is both the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime in order to prosecute innocent people.

Criminal activity, however, is such that stealth and strategy are necessary weapons in the arsenal of the Police Department.

The use of tape recordings is a proper method of law enforcement. Even when the defendant does not know they are being used and whether or not you approve of such use is not a factor in your decision.

Effect of prior inconsistent statements, or conduct by a witness not a party by the accused. Evidence that at some other time a witness other than the accused has said or done something or has failed to say or do something which is inconsistent with the witness' testimony at the trial may be considered by the jury for the sole purpose of judging the credibility of the witness, but may never be considered as

evidence or proof

of the truth of any such statement.

Where, however, the witness is a defendant on trial in the case and by such statement or other conduct the defendant admits some fact against his interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact so admitted as well as for the purpose of judging the credibility of the defendant as a witness.

An act or omission is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Character evidence, reputation of defendant. Where a defendant has offered evidence of good general reputation for truth and veracity or honesty and integrity or as a law abiding citizen, the jury should consider such evidence along with all the other evidence in the case. Evidence of a defendant's reputation inconsistent and veracity or honesty and integrity as a law abiding citizen has not been discussed or that those traits of the defendant's character have not been questioned may be sufficient to warrant an inference of good reputation as to those traits of character.

Evidence of a defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of a crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime. The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Opinion evidence, expert witness. The rules of evidence ordinarily do not permit witnesses to testify as to their opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. Witnesses who by education or experience have become expert in some art, science or profession or calling may state an opinion as to relevant or material matter in which they profess to be experts and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves.

If you should decide the opinion of an

expert witness is not based upon sufficient education and experience or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

Inconsistent statements or conduct. The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of a witness and not to establish the truth of these statements.

It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached. If a witness is shown knowingly to have testified falsely concerning any material fact, you have a right to distrust such witness' testimony in other particulars, and you may reject all of the testimony of that witness or give it such credibility as you may think it deserves.

An act or ommission is knowingly done if

done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Testimony of federal officials. The probable truthfulness and believability of every witness is for you and for each of you to decide. That I have already instructed you. The fact that such witnesses come before you as Government agents should not in the least change your attitude in this respect. Their testimony does not deserve either greater or lesser believability simply because of their official status. Whether you do or do not believe any witness must depend on how truthful you judge that witness to be after you have heard the testimony and formed your own conclusions as to the witness' believability.

Judging the evidence. There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question, depending on evidence presented to them.

You are expected to use your good sense. Consider the evidence in the case for only those purposes for which it has been admitted. And give it a reasonable and fair construction in the light

of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond a reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case. And remember as well, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The jury's recollection controls. If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Punishment.

Now, under your oaths as jurors you cannot allow a consideration of the punishment which may be imposed upon the defendant if convicted to influence your verdict in any way or in any sense enter into your deliberations.

The duty of imposing sentence rests exclusively

upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence and the evidence alone. And you must not include by any assumption conjecture or sympathy or any inference not warranted by the facts until proven to your satisfaction.

Exclude sympathy and antipathy.

In reaching your verdict you are not to be affected by sympathy or antipathy for any of the parties, what the reaction of the parties or the public to your verdict may be, whether it will displease or please anyone, be popular or unpopular or indeed any consideration outside the case as it has been presented to you in this courtroom. You should consider only the evidence, both the testimony and the exhibits. Find the facts from what you consider to be the believable evidence and apply the law as I now give it to you to those facts. Your verdict will be determined bythe conclusion thus reached, no matter whom the verdict helps or hurts.

Unanimous verdict: Now, in this type of case there must be a unanimous verdict. That means all twelve of you must agree. And it goes without saying that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether at least you can with good conscience agree with him or her.

You have no right to stubbornly and idly sit by and say, "I am not talking to anyone, I am not going to discuss it." Because people with common sense and the ability to reason must communicate. They must communicate their thoughts.

So anything which appeared in the record and about which one of you may not agree, talk it out amongst yourselves and then if you can agree as to what is in the record, well then you can ask the Court to have that portion of the testimony read back to you. You may do so by knocking on the door and giving a note to the United States Marshal who will then present it to the Court and I will then bring you into the

court.

The Foreman will preside over your deliberations and will be your spokesman here in court.

As to the form of verdict as to count one, not guilty or guilty; as to count two, not guilty or guilty; as to count three, not guilty or guilty; as to count four, not guilty or guilty; as to count five, not guilty or guilty.

In connection with your deliberations you will take the evidence into the jury room to use during your deliberations together with a copy of the indictment in this case.

You do not have the transcripts or the tapes to take into the jury room. The tapes you will have to come back to the jury room, if you wish to rehear the tapes.

Lunch has been ordered and lunch will be there at 12:00 o'clock.

The two alternates at this time are excused with the thanks of the Court.

The Marshal will bring your lunch down to the jury room on the first floor and the two alternates may at this time leave. They are

discharged from this case with the thanks of the Court and you may take your things from the jury room and leave.

Thank you.

I will speak to the lawyers at side bar.

(The two alternates leave the courtroom.)

(The following takes place at side bar out of the hearing of the jury.)

THE COURT: Any exceptions to the charge?

MR. KLEIN: Yes.

On count five, I noticed you read "Intelligent, and I don't have the copy of the indictment before me.

THE COURT: That's in the indictment.

MR.APPLEBY: Yes, your Honor.

MR. KLEIN: I respectfully move to dismiss count five on the ground that it doesn't contend that the defendant had the intention to commit the crime.

THE COURT: Denied.

MR. KLEIN: All right.

Next--I may have overlooked it, but did you tell the jury now--I know you did in the beginning--but did you tell them now that the indictment is not

evidence?

THE COURT: Yes, I did.

MR. KLEIN: You gave a charge against interest of the defendant and I don't think there was any in the case.

THE COURT: There may have been--

MR. KLEIN: You didn't charge anything about minority.

THE COURT: I'm sorry?

MR. KLEIN: The jury has no right to change a verdict because of the reason of minority. They are in the minority. For that reason alone they are not permitted to change. They must exchange views.

THE COURT: I told them that.

MR. APPLEBY: That's covered.

MR. KLEIN: You didn't say that on the minority. That's when you stopped me yesterday when I was saying it.

THE COURT: I didn't use the word "minority" but I covered that.

MR. KLEIN: That's all I have.

MR.APPLEBY: No exceptions, your Honor.

THE COURT: It may be an admission by his

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conduct in turning over the cocaine in count five, his conduct.

(The following takes place in open court and in the presence of the jury.)

THE COURT: The Clerk will swear in the U.S. Marshal.

(U.S. Marshal is sworn.)

THE COURT: All right.

Check to see that the alternates are out and then the jury may retire.

THE CLERK: They are out.

THE COURT: All right.

The jury may retire for deliberations.

(The jury leaves the courtroom for the purpose of commencing their deliberations at 11:14 a.m.)

(The following takes place out of the presence of the jury.)

THE COURT: Mark the request to charge for each of the parties.

THE CLERK: Court exhibits.

MR. KELLEY: Your Honor, with respect to the exhibits that Mr. Meltzer brought into court, I would ask your Honor's permission to retain those

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exhibits for possible investigation.

THE COURT: You mean after the case is over?

MR. APPLEBY: After the case is over.

THE COURT: It's all right.

MR.KLEIN: I have one thought. I don't mind documentary evidence going in, but when you put in cocaine in a confined space within four walls, that pervades the whole atmosphere.

THE COURT: I sent all of the exhibits into the jury.

MR. KLEIN: You can understand the effect it has on a person.

THE COURT: I don't know what effect it has on a person.

MR. KLEIN: Being in a room with that poison.

THE COURT: It's all in sealed containers. Nothing is opened.

MR.KLEIN: I don't mean it will contaminate them physically. I mean it will contaminate their mental observation.

THE COURT: That's part of the evidence in the case and they will take it all in.

(Whereupon the exhibits are brought into

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the jury room.)

THE COURT: Their lunch comes at 12:00 and at 12:00 we will go to lunch, all right?

MR. APPLEBY: Your Honor, I am having typed out the release of Harvey Rosenberg. I am going to have it typed up today.

THE COURT: Get it done as soon as you can. Have it done now.

THE CLERK: Government request to charge is Court Exhibit Number 2. Defendant's request to charge is Court Exhibit Number 1.

(So marked.)

(A recess is taken awaiting further communication from the jury.)

(Court is reconvened at 11:51 A.M.)

THE COURT: Mark this.

THE CLERK: Marked Court Exhibit Number 4.

(So marked.)

THE COURT: Court Exhibit Number 4 states: We would like to rehear the tapes from the 10th through the 17th. Is it possible so that we can hear it in the jury room so we can talk? If not, can the speaker be moved close to us? I guess we

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will move the speaker as close as possible.

MR. KLEIN: Take a look at the time, your Honor.

THE COURT: We will have to do it right now.

That's the 10th and the 17th.

Separate them. Put one further down and one up this way.

Do you want me to bring in the jury?

MR. APPLEBY: We have to just find the beginning of the tape, your Honor.

(Whereupon the two speakers are moved to the front of the jury box.)

THE COURT: All right.

Bring in the jury.

(The jury enters the courtroom at 11:55 A.M.)

THE COURT: The jury's note reads: We would like to hear the tape from the 10th and the 17th. Is it possible to hear them in the jury room so we can talk? If not, can the speaker be moved closer to us?

The tapes will have to be heard here in court.

You may proceed, the 10th and the 17th.

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SGT. RAWALD: This is the tape of the 10th first.

(Whereupon the tape recording referred to is played.)

SGT. RAWALD: Now the tape of the 17th, your Honor?

THE COURT: Surely.

(Whereupon the tape recording referred to is begun to be played and the following occurred.)

SGT. RAWALD: Excuse me, your Honor, it wasn't started at the beginning. Do you mind if I backtrack it?

THE COURT: Backtrack it and start at the beginning.

(Whereupon the tape recording referred to is played.)

THE COURT: All right.

Those are the tapes. I believe your lunch is here.

The jury may have lunch and after lunch may continue their deliberations.

The jury may leave.

(The jury leaves the courtroom at 12:30 P.M.)

THE COURT: Return at 1:30.

(Luncheon recess.)

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AFTERNOON SESSION

(The time is 1:41 P.M. and court is reconvened.)

(The following takes place out of the presence of the jury.)

THE COURT: Mark this. They want to hear the other tape.

THE CLERK: Note from the jury is marked Court Exhibit 5.

(So marked.)

THE COURT: Ready to bring the jury in?

MR. KLEIN: Yes.

MR. APPLEBY: Yes.

THE COURT: All right.

Bring the jury in.

(The jury enters the courtroom at 1:43 P.M. and the following takes place in open court and in the presence of the jury.)

THE COURT: This note reads: May we hear the third tape on the telephone call?

Please play the third tape.

(Whereupon the tape recording referred to is played.)

THE COURT: Is that it?

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SGT. RAWALD: That's it.

THE COURT: All right. The jury may return for their deliberations.

(The jury leaves the courtroom at 1:53 P.M.)

(A recess is taken awaiting further communication from the jury.)

(Court proceedings are reconvened at 2:27 P.M. and the following takes place out of the presence of the jury.)

THE COURT: The jury's note says: We have reached a verdict.

All right, bring in the jury.

(The jury enters the courtroom at 2:28 P.M. for the purposes of rendering a verdict.)

THE COURT: You may take the verdict.

THE CLERK: Let me mark the note, your Honor.

THE COURT: Yes.

THE CLERK: Note from the jury marked Court Exhibit #6.

THE COURT: You may take the verdict.

THE CLERK: Madam Foreman and ladies and gentlemen of the jury, have you reached a verdict?

THE FORELADY: Yes, we have.

THE CLERK: How do you find the defendant

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Joseph Setter on count number one?

THE FORELADY: Guilty.

THE CLERK: How do you find the defendant Joseph Setter on count number two?

THE FORELADY: Guilty.

THE CLERK: How do you find the defendant Joseph Setter on count number three?

THE FORELADY: Guilty.

THE CLERK: How do you find the defendant Joseph Setter on count four?

THE FORELADY: Guilty.

THE CLERK: How do you find the defendant Joseph Setter on count five?

THE FORELADY: Guilty.

THE CLERK: You say you find the defendant guilty on count one, two, three, four and five, and so say you all?

THE FORELADY: Yes.

THE COURT: Poll the jury.

THE CLERK: Juror Number 1, you say you find the defendant Joseph Setter guilty on count one, two, three, four and five.

Is that your verdict?

JUROR NUMBER 1: Yes, it is.

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it was nice having you. Your service has been completed, so you may leave.

Have a nice day and the jury may leave.

Thank you.

(The jury leaves the courtroom at 2:31 P.M. and the following takes place out of the presence of the jury.)

THE COURT: Mr. Klein, before you do anything I will accept a motion as to count five.

MR. KLEIN: At this time I move to vacate and set aside the verdict on count five on the ground that--I move to dismiss on count five, your Honor.

THE COURT: Anything you wish to say, Mr. Appleby?

MR. APPLEBY: No.

THE COURT: Well, that count was improperly phrased and at this time in instructing the jury I gave instructions which were not consistent with what the count set forth. The motion to dismiss as to--

MR. APPLEBY: Before you make a decision on that, your Honor, I might point out, your Honor, that Mr. Klein has an opportunity to dismiss that

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count on many occasions and he did not do so. He didn't do it at the close of the Government's case and he didn't do it at any time. He could have done it before trial on a motion to dismiss.

Furthermore, I did look into this matter and I talked to my superiors. It was a typographical error and that's all it was.

THE COURT: I understand that.

MR. APPLEBY If your Honor is inclined to dismiss that count--

THE COURT: You see, I instructed them as to knowingly and intentionally.

MR. APPLEBY: That will be correct.

THE COURT: It is correct. But it wasn't until the end of the case that I read that count that I saw that the word "intelligently" was improperly in the count.

MR. APPLEBY: If your Honor is inclined to dismiss that count, I believe it would be a very grave error, your Honor. The case law would not support it. Your Honor was absolutely correct in the way you handled the matter and I would ask leave of the Court to research that point because it's very important in terms of an appeal.

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THE COURT: In light of the Court's instructions to the jury as to that count, and those instructions could not be correct, they have to be misinterpreted.

MR. APPLEBY: Your Honor would have been quite correct in saying it's a typographical error and I will now read it as "intentionally." There would be nothing wrong with that. I would urge your Honor to allow me to present cases because what you did was absolutely correct.

THE COURT: I cannot agree with your position and in light of what is before the Court I am going to grant the motion to dismiss as to count five only.

All right, any motions you have to make otherwise?

MR. KLEIN: Well, may I reserve--all right, in view of the fact that your Honor just granted the motion to dismiss count five, I then ask for a dismissal of the other four counts because the evidence that came in on count five was so overwhelming that it spread and contaminated the other four counts, particularly the fact that all this cocaine that was obtained on July 3rd on count five

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was sitting in the room with the jurors while they were deliberating on the first four counts.

THE COURT: That motion is denied.

MR. KLEIN: All right.

I would like to reserve all other motions to sentence day and may I renew that motion on the date for sentence?

THE COURT: What is that?

MR. KLEIN: May I renew that motion on the sentence date?

THE COURT: No, that motion is denied. There is no need to renew it. That motion is denied.

On the question of bail, Mr. Appleby.

MR. APPLEBY: Your Honor, the bail was fixed at a $10,000 personal recognizance bond.

I might point out that was fixed when the agents believed the defendant was going to cooperate.

As far as the defendant's presence for sentence, I have mixed feelings about it, your Honor. He has shown up, it is true, for trial on every occasion. I have mixed feelings and I would leave it up to your Honor what to do about bail.

# JUDGMENT OF CONVICTION

United States of America vs. A-774

**United States District Court** for

DEFENDANT: JOSEPH SETTER

DOCKET NO.

JUDGMENT AND PROBATION/COMMITMENT ORDER

**COUNSEL**

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH, DAY, YEAR: [illegible] 21, 1976

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL [illegible] (Name of counsel)

**PLEA**

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE [ ] NOT GUILTY

**FINDING & JUDGMENT**

There being a finding/verdict of [ ] NOT GUILTY [X] GUILTY

Defendant has been convicted as charged of the offense(s) of:

In that on or about and [illegible], 21(a)(1) defendant, did knowingly and [illegible] with intent to distribute and did distribute cocaine, [illegible] controlled substance

**SENTENCE OR PROBATION ORDER**

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 7 years on count 1 plus a special parole term of 3 years. On counts 2, 3 and 4 the defendant is sentenced for a term of 7 years plus a special parole term of 5 years. Sentences on count 2, 3 and 4 to run concurrent with the sentence in count 1.

SEP 21 1976

**SPECIAL CONDITIONS OF PROBATION**

**ADDITIONAL CONDITIONS OF PROBATION**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of [illegible] years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The Court orders commitment to the custody of the Attorney General and recommends

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Mar-

**RECOMMENDATION/ RETURN SIGNED BY**

[✓] U.S. District Judge

[ ] U.S. Magistrate

Henry B. Lamwell

Sept 20 1976

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NOTICE OF APPEAL

A-715

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- vs -

[illegible]

- - - - - - - - - - - - - - - - - X

NOTICE OF APPEAL

File No: _____

Notice is hereby given that the defendant [illegible] hereby appeals in forma pauperis to the United States Court of Appeals for the Second Circuit from the final Judgment entered in this proceeding on the 24th day of [illegible] 197

Dated: Brooklyn, New York

September [illegible], 197-

By Direction of the Court

LEWIS ORGEL, CLERK
U.S. District Court
Eastern District of New York
on behalf of the defendant

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Jones

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